

THE CONTRACT CLAUSE OF THE CONSTITUTION

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THE CONTRACT CLAUSE OF THE CONSTITUTION

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TO
A. R. W.

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B. F. W.

LEVERETT HOUSE
CAMBRIDGE, MASSACHUSETTS
MAY 15, 1938

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INTRODUCTION

DURING the nineteenth century no constitutional clause was so frequently the basis of decisions by the Supreme Court of the United States as that forbidding the states to pass laws impairing the obligation of contracts. If we exclude the commerce clause as being primarily a grant of power to the national government, although it is also significant because of its treatment as a restriction upon state powers, the contract clause was the constitutional justification for more cases involving the validity of state laws than all of the other clauses of the Constitution together. Professor Corwin pointed out nearly a quarter of a century ago that the doctrine of vested property rights has from the beginning been the basic doctrine of American constitutional law. So far as the Supreme Court is concerned this doctrine was for three generations almost synonymous with the interpretation of the contract clause. Because of this the clause has a unique position in the development of judicial review of legislation.

More recently this clause has relinquished its position of primacy to the more elastic due process clause, although it has not ceased to be a factor with which legislators must reckon. But during the nineteenth century it held a position of extraordinary importance in the growth of American industrial society. In no other country had it been necessary for legislative bodies intent upon regulating the economic activities of the people to have their enactments face the test of the stringent judicial control exercised by the courts under the cloak of interpreting a constitutional provision of this kind. The contract clause is of particular interest because the period of its vigor is that of the growth of the corporate form of industrial organization, as well as that of the beginnings of state attempts to control such corporations in the interest of the public welfare. A large proportion of the constitutional problems involved in the govern-

ment regulation of industrial activity were first considered in terms of the contract clause. It has consequently played a major rôle in our economic, as well as our constitutional history.

This study represents an attempt to discover what the nature and significance of this dual rôle has been. Of course, a complete account of the results of judicial interpretation of the contract clause would involve a consideration of thousands of cases in the lower federal and the state courts (for almost all state constitutions came to include such a clause) as well as an exhaustive study of statutes enacted to take the place of those declared unconstitutional, and of similar statutes which, for one reason or another, were never tested in a court. It would also involve a study of the effect upon particular corporations and other economic entities of all of these decisions. Such an investigation would be a monumental task requiring many years for its completion. I have sought here simply to deal with the cases on the contract clause, some five hundred of them, brought before the Supreme Court of the United States. Its rulings are final, and it is doubtful if any problems of general significance have been dealt with in other courts which are not touched upon in its decisions.

This is not a treatise on the law of the contract clause. I have been concerned with portraying the rôle of the Supreme Court as a governing body in American life, not with the attempt to guide technical lawyers to the body of existing law. In dealing with this aspect of our constitutional history I have necessarily been concerned with the legal principles expressed by the Court in its interpretation of the contract clause. I have attempted to set forth the leading decisions, both those which marked the major lines of expansion in the growth of the clause and those which represent the principal points of contraction, in sufficient detail so that the process of judicial review might be made clear. But the innumerable run-of-the-mine cases are summarized more briefly with the design of indicating the widespread economic effect of the work of the Court in the name of the contract clause. In these surveys I have neglected the more technical

legal refinements in favor of the factual situations with which the legislation and the Court's rulings dealt. Because this is a study located somewhere on the undefinable and overlapping borders of constitutional and economic history I have ordinarily classified the hundreds of lesser contract cases in terms of the kinds of parties and the subject matter of the statutes involved, rather than from the standpoint of the legal categories. This approach has seemed to me to be better suited to a study of the nature and effects of the institution of judicial review than one which emphasized results in terms of legal rules. I have not been entirely consistent in this, for parts of several chapters, and all of Chapter XI, have been organized on a different pattern. In these instances the nature of the subject matter seemed to warrant a deviation from consistency.

Primarily I have sought to find out what the clause was intended to mean by its authors, by what process it was expanded, what kinds of statutes have been tested by those enlarged principles, and, so far as can be determined by a study of the decisions, what the effect upon state legislation has been. For example, everyone who has the slightest knowledge of American constitutional law or history knows that Chief Justice Marshall ruled that a corporate charter is a contract and as such is protected against legislative impairment. An acquaintance with that rule does not, however, go far toward furnishing information concerning the kinds of corporations which have profited from its formulation, or of the kinds of statutes which have been declared invalid. Nor does it tell us whether the original rule has since been modified and, if so, whether the modifications have had significant consequences. Similarly, since the Minnesota Moratorium Case in 1934 the relation of the contract clause to depression-era legislation has been of renewed interest. I have sought to discover the extent to which statutes giving relief to debtors in time of depression have been held unconstitutional by the Court and, incidentally, to consider the probable future importance of the Minnesota decision.

Beyond the attempt to chart the rise, ascendancy, and de-

cline of the contract clause in terms of its economic consequences I have been particularly interested in the judicial expansion of the contract clause as one phase of the legal, political, and economic thought of its century. The evidence appears to indicate that the clause of the Fathers and the clause as interpreted by the Supreme Court are far from being the same thing. The limited, relatively specific meaning attached to it in 1787 does not foreshadow its meaning in 1835 or 1864. When the courts developed the prohibition into one far more inclusive and of much greater economic significance than had been anticipated by the Framers did their work result in criticism from the advocates of democracy? It is to be remembered that the period in which the scope of the clause was being widened was also the period of the broadening of the suffrage, of increased control by the electorate of the officers and processes of government, and of many social reforms. While state constitutional systems were becoming more democratic in character the courts, state and national, were steadily increasing their supervisory control over the legislative output. Did this latter process represent a reaction against the growth of democracy, or was it, in some way, a part of the same set of ideas?

The history of American democracy is not without its paradoxes. For, as will be pointed out in the following chapters, there is a considerable body of evidence tending to demonstrate that the judicial expansion of the clause fitted in remarkably well with the desires and the fears of the earlier democratic sentiment. The violent attacks which greeted some decisions were apparently not characteristic of the general attitude toward the entire process of which those cases are a part. In the acceptance of these restrictive rulings there is material which sheds more than a little light on the history and nature of American democracy. Neither the theory nor the practice of American democracy during the first half of the nineteenth century is sufficiently described in terms of the movement to broaden the distribution of power and of privilege. They are far more complex. A zeal for the spread of political rights did

not necessarily mean an absence of devotion to the vested rights of property. The reconciliation of majority rule with the security of private property has always been a problem fundamental in democratic government. In considering the way in which this reconciliation was achieved, or at least attempted, in America of the last century the story of the contract clause cannot be neglected.



PART I

THE RISE OF THE CONTRACT CLAUSE

CHAPTER I

ORIGINS AND EARLY INTERPRETATIONS

The Economic Background of the Contract Clause. About a generation ago it became popular once more to interpret the framing and adoption of the Constitution largely in terms of economic forces and motives. This point of view is, of course, not new, as the debates in the Convention of 1787 and in the struggle over ratification indicate. Such contemporary historians as John Marshall¹ and David Ramsay² had no hesitancy in making clear their own acceptance of an economic interpretation for much that took place in 1787 and 1788. Nor did this interpretation ever die out, although for a time during the nineteenth century it tended to be somewhat obscured by what may be called the patriotic statesman theory.³ Toward the end of that century, however, the Granger-Populist-Progressive movements with their emphasis upon democratic reforms and their impatience with the slow processes of the Constitution, particularly when those processes were made yet more slow by a number of restrictive decisions of the Supreme Court, aided in bringing back to popularity the belief that the men of 1787 were not entirely dispassionate in their work. The Constitution, many people concluded, was not drafted on Olympus, nor was it planned in the interest of all of the people. Rather was it the product of the desires and concerns of the economic classes which then exercised political power. This doctrine came to have great popularity among historians, especially after the appearance of Charles A. Beard's *Economic Interpretation*

¹ *Life of George Washington* (1804-07), V, 85 et seq.

² *History of the United States* (1816-17), II, 429, III, 77. Cf. James Madison, *Preface to the Debates in the Federal Convention*, and Fisher Ames, *Works* (1809 ed.), p. 120.

³ In many of these writings, however, the economic factors of the times are not entirely neglected. See, e.g., George Bancroft, *Formation of the Constitution of the United States* (1883), I, ch. VI, and II, 214, and G. T. Curtis, *Constitutional History of the United States* (1889), I, chs. VIII et seq., and pp. 546-52.

of the Constitution in 1913. One may agree with the general tenets of this newer, and older, theory of the beginnings of the union without subscribing to all of the corollaries which are ordinarily derived from it.⁴ The early history of the contract clause is very much a case in point.

There can be little doubt that one of the principal causes for the dissatisfaction with the prevailing state of affairs under the Confederation among the well-to-do classes was the mass of legislation in the states which was highly unwelcome to creditors as it was popular with debtors. Most of these laws took the form of providing for the issuance of paper currency, with the frequent addition of the requirement that this currency be accepted as legal tender in the payment of private debts.⁵ In addition there were "stay laws" (statutes staying or postponing the payment of private debts beyond the time fixed in contracts), installment laws (acts providing that debts could be paid in several installments over a period of months or even years rather than in a single sum as stipulated in the agreement), and commodity payment laws (statutes permitting payment to be made in certain enumerated commodities at a proportion, usually three-fourths or four-fifths, of their appraised value).⁶ Naturally the creditors preferred to receive payment at the stipulated time, and in money rather than in land, cattle, tobacco, slaves, flour, hemp, or whatever the state in question saw fit to make legal tender. We have the contempo-

⁴ Mr. Beard has observed in the introduction to the 1935 edition of this book that all manner of conclusions have been attributed to him which are not to be found in the book itself. Another evidence of the uncritical way in which this theory is applied is found in the usual method of citing Madison's 10th *Federalist* in support of the principle of economic causation. Rare indeed is the citation to that remarkable essay which quotes more than Madison's statement of the importance of economic motives. Yet that statement is preceded by the enumeration of other motives which are in no direct sense economic in character.

⁵ C. J. Bullock, *Monetary History of the United States* (1900), ch. V; D. R. Dewey, *Financial History of the United States* (1902), ch. II.

⁶ For a survey of legislation of this kind see Allan Nevins, *The American States during and after the Revolution, 1775-1789* (1924), pp. 386, 390, 404, 457, 525, 532, 533, 537, 549, 570-71. See also Bancroft, *Formation of the Constitution*, I, ch. VI, and the dissenting opinion of Justice Sutherland in *Home Building and Loan Assn. v. Blaisdell*, 290 U. S. 398, 454 *et seq.* (1934).

aneous statement of Madison to support the conclusion that "the evils issuing from these sources" contributed heavily toward preparing the public mind for a general reform.⁷ The Fathers were undoubtedly opposed to the continuance of state legislation of this kind. But a careful reading of the debates in the Convention and in the ratification controversy fails to produce the evidence necessary to support the belief that the clause in Article I, Section 10, of the Constitution forbidding the states to pass laws impairing the obligation of contracts was one of the clauses of that document which was regarded with great concern, either by the Framers or by the Anti-Federalists.

There is no mention of any specific remedy for stay laws, installment and commodity payment acts in the various plans submitted to the Convention. To be sure, the Virginia plan did include a national veto on state legislation. But after this was rejected by the Convention several weeks passed before there was any mention of a prohibition on legislation of the kind against which the contract clause is supposed to have been directed. Nor was there at any time during the Convention debates any mention of such state legislation. This could not have been because of fear of an unfavorable reaction from the people; the debates were secret. Very probably the reason for this lack of interest was the realization on the part of the members of the Convention that the stay and other laws altering the terms of contracts were at base products of the absence of a plentiful supply of reliable money. The Fathers were patently aware of the importance of the money problem. There was comparatively early and general agreement that the states should be forbidden to emit bills of credit, coin money, or give to anything but specie the quality of legal tender. Similarly they agreed that the national government should be empowered to coin money and regulate its value. Having accepted these pro-

⁷ *Writings* (Hunt ed.), V, 27. It is interesting to notice that in this letter to Jefferson, written October 24, 1787, Madison says that "restraints against paper emissions and violations of contracts are not sufficient." In other words, he is here defending to Jefferson the original proposal in the Virginia plan for a national negative or veto on state legislation.

visions they evidently assumed, at least until the closing days of the Convention, that the debtor-relief-legislation problem had been dealt with.

There was considerable justification for this assumption. Most of the state laws of which complaint had been made were for the issuance of paper money, the greater part of which depreciated rapidly in value, together with the accompanying legal tender provisions. The other acts passed primarily in the interest of the debtors seem to have stemmed from the same causal root — an entirely inadequate supply of money of fixed and known value. It is not necessary to ascribe disreputable motives to the state legislators who voted for the debtor relief laws. To many of them statutes of this kind must have seemed to present the smallest proportion of evils. If all debts were required to be paid precisely as set forth in the contracts it could but mean in that period, particularly in the years of economic depression immediately preceding the adoption of the Constitution, great and doubtless unwarranted hardships for many an honorable debtor. Some of the members of legislatures adopting statutes of this kind very probably believed that the creditors as well as the debtors would, in the long run, profit from these alterations in the terms of private contracts. At any rate the relation between these acts alleviating the conditions of debtors and the regulation of the supply of money was unquestionably a factor in the attitude of the Fathers toward the adoption of the constitutional provisions specifically dealing with the currency. Furthermore the agreement upon these provisions goes far toward explaining the otherwise surprising lack of interest, both in the Convention and after, in the adoption of a clause specifically aimed at statutes, other than those providing for the issuance or valuation of money, affecting the relation of debtors and creditors.

The First Contract Clause. It is probable that the Constitution would have contained no clause dealing with the subject of contracts had not the second article of the Ordinance for the Northwest Territory contained the words "And, in the just

preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements *bona fide*, and without fraud previously formed.”⁸ This ordinance was enacted on July 13, 1787, some six weeks after the Convention assembled in Philadelphia, by the Congress under the Articles of Confederation which was sitting in New York. Intended for the temporary government of the region north of the Ohio, it provided for the admission of successive portions of that area to statehood. In a letter dated July 15, Richard Henry Lee, in sending Washington a copy of the ordinance, said, “It seemed necessary, for the security of property among uninformed, and perhaps licentious people, as the greater part of those who go there are, that a strong toned government should exist, and the rights of property be clearly defined.”⁹ Since the governmental system provided for those “licentious” settlers was, by all contemporary standards, a most liberal one, Lee doubtless had in mind certain provisions limiting the exercise of governmental powers, including the contract clause. We have little reliable information concerning its authorship or the discussions leading to its inclusion. A strong argument has been presented to the effect that the Reverend Manassah Cutler, a member of and the lobbyist for the Ohio Company, was chiefly responsible for it.¹⁰ This great land company was negotiating for the grant of an enormous tract, and it doubtless was anxious, especially because it had no charter, lest its future transactions be in various ways interfered with by the territorial legislatures which were to be established under the Ordinance. But whether the agent of this vast speculative enterprise, or Lee, or some other member of the Congress was immediately responsible for the inclusion of this

⁸ *United States Code* (vol. 44, pt. I, of the *Statutes at Large*), 1851.

⁹ J. C. Ballagh, ed., *Letters of Richard Henry Lee* (1914), II, 425.

¹⁰ W. P. and Julia P. Cutler, *Life Journals and Correspondence of Rev. Manassah Cutler L.L.D.* (1888), I, ch. 8; W. F. Poole, “Dr. Cutler and the Ordinance of 1787,” *North American Review*, CCLI (April 16, 1876). Cf. the article on Cutler by C. M. Fuess in *Dictionary of American Biography*, V, 13.

clause in the Ordinance, it appears to be certain that this guarantee of security to *bona fide* private contracts was the immediate cause for the proposal of a similar clause in the Federal Convention.

The Convention of 1787. In that Convention three months passed before there was any mention of a desire to secure the protection of contracts, private or otherwise. On August 28 Rufus King of Massachusetts "moved to add, in the words used in the ordinance of Congress establishing new states, a prohibition on the states to interfere in private contracts."¹¹ The discussion on the motion lasted but a few moments, and the absence of any reference to debtors' relief legislation in that short debate is only less surprising than the lack of interest shown in the motion itself. The motion was opposed by the curious combination of Gouverneur Morris and George Mason — the one usually held the most aristocratic and the other the most democratic views of any members of that body. Morris argued that such a provision would interfere with the passage of necessary legislation relating to the bringing of actions, laws thereby affecting contracts. The Federal judicial power will be a protection in cases within the jurisdiction of the federal courts, "and within the State itself a majority must rule, whatever may be the mischief done among themselves."¹² After Sherman had said, "Why then prohibit bills of credit?" and Wilson had expressed his approval of the motion, Madison made the longest speech in its behalf: "Mr. Madison admitted that inconveniences might arise from such a prohibition but thought on the whole it would be overbalanced by the utility of it. He conceived however that a negative on the State laws could alone secure that effect. Evasions might and would be devised by the ingenuity of the Legislature."¹³ Mason then said that this would be going too far; statutes limiting the right of action are frequently necessary, and it would be unwise to tie the hands of the states. Whereupon Wilson said that "the answer to

¹¹ Max Farrand, *Records of the Federal Convention* (1911), II, 439.

¹² *Ibid.*

¹³ *Ibid.*, p. 440.

these objections is that *retrospective* interferences only are to be prohibited.”¹⁴ Madison then asked, “Is not that already done by the prohibition of *ex post facto* laws, which will oblige the Judges to declare such interferences null and void?” Now the only provision to that effect so far accepted, or even proposed, applied only to the acts of Congress,¹⁵ and it was perhaps for that reason, although no such explanation appears in Madison’s notes, that Rutledge “moved instead of Mr. King’s motion to insert — ‘nor pass bills of attainder nor retrospective ¹⁶ laws.’ ” Without further debate this was adopted by a vote of seven states to three.¹⁷

The discussion of August 28 was, however, not to be the last of the matter. In the report of the Committee on Style, presented on September 12, the clause had been changed to read, no state shall pass laws “altering or impairing the obligation of contracts.”¹⁸ We know nothing of the discussion in the Committee and can only guess at the reason for the alteration. On September 14, the section of which these words were a part was changed slightly and the word “altering” dropped out.¹⁹ No discussion accompanied this change. There was not even any debate concerning the desirability of such a clause.²⁰ Gerry moved that the prohibition be made a limitation upon the Federal Government, but his motion was not seconded.

Just why the contract clause was accepted without opposition or discussion, after it had earlier been opposed and then accepted only in an ambiguous form, is not clear. Of course this

¹⁴ *Ibid.* Italics in the original.

¹⁵ *Ibid.*, II, 375, 376.

¹⁶ In the Journal this term is “*ex post facto*.” There are enough errors in the Journal to discredit its accuracy, but in this instance there is some evidence to support it. In the Washington and Brearly copies of the *Report of the Committee of Detail* marginal notes attest the accuracy of the Journal, rather than Madison’s account (Farrand, *Records*, II, 440 n.).

¹⁷ Connecticut, Maryland, and Virginia voted in the negative.

¹⁸ Farrand, *Records*, II, 597. The members of this committee were G. Morris, King, Madison, Hamilton, and Johnson.

¹⁹ Farrand, *Records*, II, 619.

²⁰ On George Mason’s copy of the September 12 draft there is a note indicating that a proposal was made to insert “previous” before “obligation” but that this was rejected (*ibid.*, II, 636, IV, 59).

was only one of several changes made by the Committee. Doubtless there were private conversations concerning the desirability of a clause protecting contracts. Perhaps some who had previously believed that an *ex post facto* clause would apply to civil legislation were convinced by Dickinson's researches in Blackstone that it had to do only with criminal legislation,²¹ and would not serve to protect against laws giving relief to debtors. About all that can be asserted with confidence is that the Framers showed surprisingly little interest in the problem, that the clause as we have it was prepared in committee, and that the records of the Convention throw very little light upon the meaning to be attached to "impairing the obligation of contracts."

Because of the peculiar phrasing employed, it has been suggested that the Framers borrowed their terminology from the Roman Law. Certainly the evidence of similarity, if not identity, of wording is strong. But there is apparently no further evidence. In none of the discussions of which we have any record — in the Convention, in the ratification controversy, in legal treatises of the next half century, or in the Supreme Court decisions in which the clause was first applied — is the meaning of the clause traced to or explained by reference to the Civil Law. And, if appeal had been made to that source it is not entirely clear just what the result would have been.²²

²¹ As has been pointed out, Madison, on August 28, expressed the view that retrospective laws affecting contracts would be held invalid by the courts under the *ex post facto* clause. Curiously, he said this while supporting King's original motion. Madison's statement on the 28th was not challenged at the time. Rutledge's motion, if the Journal phrasing is correct and his term was not "retrospective" but "*ex post facto*," was intended to make this prohibition apply as against the states. On August 29 Dickinson read from Blackstone to prove that *ex post facto* applied only to criminal legislation (*ibid.*, II, 448). But this by no means settled the matter. As late as September 14 Mason moved to strike out the *ex post facto* clause because it was not sufficiently clear that the prohibition was limited to crimes. He said that no legislature could avoid "after the fact" legislation on civil matters. Gerry thought that the clause should be extended to cover civil legislation (*ibid.*, p. 617). This confusion as to the application of the *ex post facto* provision is also to be found in the state convention debates. See Jonathan Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* (2 ed., 1861), II, 406-07, III, 472, 474, 476, 479, IV, 184-85. See also *infra*, pp. 32-33.

²² The term "obligation" originated in the Roman Law, in which it was a

On the basis of the assumption that "obligation of contract" is derived from the Civil Law there is an oft-repeated tradition that James Wilson was the author of the clause as it came from the Committee. Wilson was acquainted with the Civil Law, since his legal education was secured in Scotland, and the Scottish law is based upon the principles of Roman Law. Furthermore he appears to have been the only member of the Convention measurably conversant with any legal system other than the Common Law, and it is known that he had earlier denied the power of the legislature of Pennsylvania to repeal corporate charters.²³ He was not a member of the Committee on Style, although he apparently had a hand in the shaping of the final draft.²⁴ But there is nothing stronger than this presumptive evidence to indicate that he, rather than King or one of the other members of the Committee, was the author.²⁵ There is no

fundamental conception. According to Salmond (*Jurisprudence*, 8th ed., 1930, § 165, p. 480), "An obligation is the *vinculum juris*, or bond of legal necessity which binds together two or more determinate individuals," and may be defined as "a proprietary right *in personam* or a duty which corresponds to such a right." The obligation is a legal relationship and a creature of law. Although certain acts may be the occasion of the arising of obligations, they cannot truly be said to create them. This Roman law conception has been adopted in its essentials by modern jurists. "Contract" in the Roman law has been referred to as "the concurrence of several persons in a declaration of intention whereby their legal relations are determined" (Savigny, *Treatise on Roman Law*, French ed., Paris, 1845, vol. III, § 140, p. 324). This broad view of contract would eliminate the distinction between a conveyance and a contract insisted upon in Anglo-American law. But it is to be noted that Savigny made a division of contracts into two classes, obligatory and not obligatory. The former, narrower sense of the term as used in Roman law is the one intended by most English jurists referring to contracts (Salmond, *ibid.*, § 123, pp. 365-66; Holland, *Jurisprudence*, 12th ed., 1916, p. 258; Anson, *Contracts*, 17th ed., 1929, p. 2; Pollock, *Contracts*, 9th ed., 1921, p. 2; Chitty, *Contracts*, 18th ed., 1930, pp. 1-2; cf. Harriman, *Contracts*, 2d ed., 1901, §§ 610-11, pp. 360-61). Hence it is apparent that in the Roman law itself the term "obligation of contracts" would be subject to varying interpretations depending on whether the term "contract" was viewed in its narrower or broader sense, and that, intentions of the framers apart, the phrase as adopted in the Constitution was ambiguous and of uncertain meaning. For a more extended treatment of this subject see W. B. Hunting, *The Obligation of Contracts Clause of the United States Constitution* (1919), pp. 19-39.

²³ *Infra*, pp. 16-17.

²⁴ Charles Warren, *The Making of the Constitution* (1928), pp. 687-88.

²⁵ For assertions of Wilson's authorship of the clause, see S. G. Fisher, *The Evolution of the Constitution of the United States* (2d ed., 1904), pp. 263-64; the

record of the proceedings of that Committee, nor is there evidence that Wilson ever claimed the authorship of the clause, or that any one participating in the Convention ever ascribed it to him. He evidently did not regard it as having a very inclusive applicability, for in his speech in the Pennsylvania ratifying convention he made but brief reference to it and he talked principally about the legal tender laws in discussing the evils for which Article I, Section 10, provides a remedy.²⁶ He makes no mention of it in his legal writings, and its interpretation by the Supreme Court came long after his death. If he was the author of the clause he did not live to assist in making of it one of the significant parts of the Constitution.

Discussions in the Controversy over Ratification. There has been so much emphasis upon the economic aspects of the struggle for the adoption of the Constitution that one would expect to find that the contract clause was one of those most fiercely attacked and most warmly defended. Discussion of it, however, both in the state ratifying conventions and the mass of pamphlet literature is relatively rare. Many clauses of the Constitution, including a number which seem to us to involve nothing more than details of governmental organization, were much more frequently debated. Furthermore, most of the discussion involving the contract clause came in connection with the debate over Section 10 of Article I,²⁷ of which the clause is a part, and the debate was almost invariably focussed upon the currency provision of that section. Ordinarily, that is to say, the contract clause was discussed, where it was mentioned at all, as if it were a part of the monetary restrictions imposed upon the

essay on Wilson by M. C. Klingensmith in W. D. Lewis (ed.), *Great American Lawyers* (1907-09), I, 182-83; J. M. Shirley, *The Dartmouth College Causes* (1879), pp. 216-17; the argument of Hunter in *Sturges v. Crowninshield*, 4 Wheat. 122 at 150-51 (1819); B. A. Konkle, "James Wilson," in *Encyclopaedia of the Social Sciences*, XV, 425.

²⁶ Elliot, *Debates*, II, 486, 491-92.

²⁷ The first sentence of Section 10 is as follows: "No state shall enter into any Treaty, Alliance, or Confederation; grant letters of Marque and Reprisal; coin money; emit Bills of Credit, make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the obligation of contracts, or grant any Title of Nobility."

states by the Constitution. These debates support the view that the debtor's relief legislation of the Confederation period was almost entirely the result of the existing shortage of a stable currency.

Among those opposed to the ratification of the Constitution, Luther Martin of Maryland, himself a member of the Federal Convention, made one of the very few speeches which show any definite conception that the contract clause was to have an application broader than the currency provisions. In a speech made before the Maryland House of Delegates on November 29, 1787, he said:

I considered, Sir, that there might be times of such *great public calamities* and *distress*, and of such *extreme scarcity of specie*, as should render it the *duty* of a government, for the *preservation* of even the *most valuable part* of its citizens, in some measure to interfere in their favor, by passing laws *totally or partially stopping* the courts of justice, or authorizing the debtor to pay by installments, or by delivering up his property to his creditors at a *reasonable* and *honest* valuation. The times have been such as to render regulations of this kind necessary in most or all of the States, to prevent the *wealthy creditor* and the *monied* man from *totally* destroying the *poor* though even *industrious* debtor. *Such times* may *again* arrive. I therefore voted against depriving the States of this power, a power which I am decided they ought to possess, but which, I admit, ought only to be exercised on very important and urgent occasions. I apprehend, Sir, the principal cause of complaint among the people at large is, the public and private debt with which they are oppressed, and which, in the present scarcity of cash, threatens them with destruction, unless they can obtain so much indulgence in point of time, that by industry and frugality they may extricate themselves.²⁸

It will be noticed that Martin, even though he is one of the few who discuss the contract clause apart from the money provisions, attributes a large share of the difficulties besetting debtors to the "scarcity of cash."

²⁸ Farrand, *Records*, III, 214-15. This speech was made before the Maryland House of Delegates, November 29, 1787, and has been frequently quoted by the Supreme Court to indicate the meaning to be given the contract clause. See Justice Sutherland's dissenting opinion in *Home Building & Loan Assn. v. Blaisdell*, 290 U. S. 398, 461 (1934).

Perhaps the clearest statement made by a proponent of ratification is contained in number 44 of the *Federalist* by Madison:

Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the Convention added this constitutional bulwark in favor of personal security and private rights; and I am much deceived if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society.²⁹

²⁹ In number 7 Hamilton in discussing the causes of discord between the states had said: "Laws in violation of private contracts, as they amount to aggressions on the rights of those States whose citizens are injured by them, may be considered as another probable source of hostility." With Madison's views in number 44 cf. the letter to his father, written December 12, 1786, in which, speaking of a pending bill in the Virginia legislature for the creation of district courts, he says, "Unhappily, it is clogged with a clause installing all debts among ourselves, so as to make them payable in three annual portions. Such an interposition of the law in private contracts is not to be vindicated on any Legislative principle within my knowledge, and seems obnoxious to the strongest objections which prevailed against paper money" (Madison, *Writings*, 1865 ed., I, 265). See also the letter to Washington, December 7, 1786, in *Writings* (Hunt ed.), II, 297-98. See also the statement in his letter to Jefferson, October 17, 1788, in which he says that the provisions "relating to Treaties, to paper money, and to contracts, created more enemies than all the errors in the System positive and negative put together" (*ibid.*, V, 271). There is evidence to support this emphasis upon the rôle of the monetary clauses, but there seems to be very little evidence, especially in the speeches and writings of the Anti-Federalists, to indicate the correctness of the reference to the contract clause.

Madison's defence of the contract clause does not help a great deal in defining its scope, but almost without exception the other references to the clause are either vague in the extreme,³⁰ or they tend to confuse it with the restrictions upon the powers of the states to issue money or to regulate its value.³¹ Perhaps the best evidence of the rarity of opposition to this clause, for Martin's speech was doubly an exception, is that although seven states proposed more or less extensive lists of amendments to the Constitution, there is no mention of the contract clause in any list.³²

The materials thus far considered appear to indicate that the men of 1787-1788 were not so greatly concerned about the contract clause as would be expected, and that although some of them were definitely of the opinion that it applied primarily as against stay laws, or laws permitting debtors to pay their creditors in some kind of commodity other than money, most of them seem to confuse this clause with the monetary provisions of Section 10. Further, it is evident that all of them discussed the clause only in relation to private contracts, i.e., contracts between individuals. There are, however, two suggestions that it might be given a broader application. Both came from Anti-Federalists, neither of whom had been a member of the Federal Convention. Patrick Henry said that "the expression includes

³⁰ See, e.g., the letter of Sherman and Ellsworth to the governor of Connecticut (Farrand, *Records*, III, 100). Somewhat clearer is the statement of David Ramsay of South Carolina in his "address" (P. L. Ford, ed., *Pamphlets on the Constitution of the United States*, 1888, pp. 379-80).

³¹ See the speeches of Charles Pinckney in the South Carolina Convention (Elliot, *Debates*, IV, 335), of Maclaine and Davie in the North Carolina Convention (*ibid.*, IV, 171-74, 183), and of Wilson in the Pennsylvania Convention (*ibid.*, II, 486); also the pamphlet of A. C. Hanson of Maryland in Ford, *op. cit.*, pp. 243-44, the letter of James Sullivan of Massachusetts in Ford (ed.), *Essays on the Constitution of the United States* (1892), p. 36, and the letter of Ellsworth in the same, p. 144.

³² The nearest to such a proposal is to be found in the lists of North Carolina and Rhode Island. The twenty-fifth amendment proposed by the former, and the third proposed by the latter, would forbid Congress or the judiciary to interfere with the redemption of paper money already emitted (Elliot, *Debates*, IV, 247; Theodore Foster, *The Minutes of the Rhode Island Convention of March, 1790*, 1929, pp. 96-8). There seems to have been no debate at all in the Rhode Island Convention on the contract clause. See Foster, pp. 54, 56.

public contracts as well as private contracts between individuals.”³³ He was at the time arguing that the states would, by Section 10, be rendered unable to redeem outstanding paper currency at less than par value. He favored redeeming it at its depreciated value. In answering this speech Governor Randolph, who had been a member of the Federal Convention, said that the contract clause was included because of the “frequent interferences of the state legislatures with private contracts.”³⁴ In the North Carolina Convention Galloway pointed out that “our public securities” had been sadly depreciated for years. “We well know that this country has taken those securities as specie. This hangs over our heads as a contract. There is a million and a half in circulation at least. That clause of the Constitution may compel us to make good the nominal value of these securities.”³⁵ Davie, who had been in the Federal Convention, immediately replied: “The clause refers merely to contracts between individuals.”³⁶

A careful search has failed to unearth any other statements even suggesting that the contract clause was intended to apply to other than private contracts. It is significant that Anti-Federalists like Martin and Mason, who had been members of the Convention, assumed this meaning of the clause. Only Henry and Galloway seem to have thought that it could or would be given a broader meaning, and they did so in discussing the problem of depreciated paper currency. Moreover, their interpretations were denied by members of the Convention, and the denials were not challenged.

Opinions of Wilson and Paine on the Sanctity of Charters before 1787. If the broad interpretation of the contract clause enunciated by Chief Justice Marshall depended for its historical justification upon the opinions expressed by the men who wrote and adopted the Constitution in 1787-1788, that justification would be indeed weak. With the doubtful exception of the

³³ Elliot, *Debates*, III, 474. His argument also gives evidence of a broad interpretation of the *ex post facto* clause.

³⁴ *Ibid.*, pp. 477-78.

³⁵ Elliot, *Debates*, IV, 190.

³⁶ *Ibid.*, p. 191. This is also given in Farrand, *Records*, III, 350.

cases involving bankruptcy laws, not one of his contract cases had to do with the kind of legislation which the authors and the ratifiers of the Constitution apparently had in mind when they accepted this provision of Article I, Section 10. Before his decision in *Fletcher v. Peck*,³⁷ however, there are a number of writings which afford at least some support for his extraordinary broadening of its meaning.

Perhaps the only ones specifically applicable are those found in several state and lower federal court decisions and those, mainly in Congress, growing out of the Yazoo lands controversy, but it may not be entirely irrelevant to refer to several statements made before 1787 for the purpose of indicating that some influential men of that day expressed views which serve to lend support to the principle set forth in the Dartmouth College opinion. During the period of the Confederation the Bank of North America was chartered both by Congress and by Pennsylvania. In 1785 an attempt was made in Pennsylvania to secure a repeal of the charter granted by the state. Among those who came to the defence of the bank were Thomas Paine and James Wilson. The latter wrote that the act chartering the bank formed a compact between the state and the corporation. While the terms are observed on one side, "the compact cannot, consistently with the rules of good faith, be departed from on the other."³⁸ Paine, possibly because he lacked Wilson's legal training, went further in his declarations concerning the proposed repeal.³⁹ He distinguished the making of statutes from the transaction by the legislature of the state's business. An act of the latter kind, "after it has passed the house, is of the nature of a deed or contract, signed, sealed and delivered; and subject

³⁷ 6 Cranch 87 (1810). *Infra*, p. 29.

³⁸ In a pamphlet, "Considerations on the Power to Incorporate the Bank of North America," *Works of James Wilson* (Andrews ed., 1896), I, 565-66. The argument of Wilson was countered in a pamphlet by an unknown author, *Remarks on a Pamphlet Entitled, 'Considerations on the Bank of North America'* (Philadelphia, 1785). Here it is stated that since the existence of the corporation depends upon a statute of Pennsylvania, it can be dissolved at any time, for any legislature can repeal the laws of its predecessors.

³⁹ "Dissertations on Government, the Affairs of the Bank, and Paper Money," in *Writings* (1837 ed.), I, 365-413.

to the same general laws and principles of justice as all other deeds and contracts are; for in a transaction of this kind, the state stands as an individual, and can be known in no other character in a court of justice.”⁴⁰ The charter of a bank is an act of contract.

The state, or its representatives, the assembly, has no more power over an act of this kind, after it has passed, than if the state was a private person. . . . No law made afterwards can apply to the case, either directly, or by construction or implication: for such a law would be a retrospective law, or a law made after the fact, and cannot even be produced in court as applying to the case before it for judgment. . . . If, therefore, a lawful contract or agreement, sealed and ratified, cannot be affected or altered by any act made afterwards, how much more inconsistent and irrational, despotic and unjust it would be, to think of making an act with the professed intention of breaking up a contract already signed and sealed.⁴¹

It is strange indeed that Paine, the arch-type of democratic theorist, should have expressed so clearly and emphatically the doctrine that a charter is a contract, a doctrine always associated with Marshall. Whether Paine's theory had any influence upon the great Chief Justice is doubtful. Marshall may or may not have read Paine's pamphlet. Except in the early days of the Revolution he was not apt to be influenced by that master propagandist. This controversy in Pennsylvania took place before the Constitution was drafted, and, as has been pointed out, not one of the Framers, including James Wilson, even suggested in 1787 the applicability of the contract clause to agreements of the kind here under consideration. Furthermore Marshall could find broad interpretations of that clause in later writings and speeches of persons whose views were much more congenial to him.⁴²

Judicial Interpretation before 1810. There are several early cases in the Federal circuit courts and at least one of importance

⁴⁰ *Writings*, I, 373.

⁴¹ *Ibid.*, pp. 376-77.

⁴² The controversy in Connecticut in 1763 over a proposal to have the legislature take steps to investigate and to check certain abuses alleged to have taken place in the government of Yale College produced some statements similar to, if weaker than, those of Paine. President Clap of Yale seems to have admitted that

in the state courts which throw light upon the attitude of the bench toward the contract clause long before Marshall was given the opportunity in *Fletcher v. Peck* to express his interpretation of that part of the Constitution. The earliest of them seems to be *Champion and Dickason v. Casey*,⁴³ a decision handed down by the circuit court consisting of Chief Justice Jay, Justice Cushing, and District Judge Marchant in the Rhode Island circuit. In 1791 the Rhode Island legislature passed an act giving to a debtor three years in which to settle his accounts, during which time he was to be free from arrests or attachments for his debts. The Court, in the following year, held this to be in violation of the prohibition against laws impairing the obligation of contracts. It seems clear that this decision was in accordance with the intent of the contract clause, or at least the intent of some of its authors, for others apparently thought that it was merely a part of the monetary restrictions upon state power. In the well known case of *Vanhorne's Lessee v. Dorrance*⁴⁴ the circuit court, speaking through Justice Paterson, gave an interpretation to the clause which is much closer to that of Marshall in *Fletcher v. Peck* than to any view expressed in 1787-1788. The controversy here arose between Connecticut and Pennsylvania claimants to lands in Pennsylvania. It was argued that an act of this state repealing a statute confirming the title of certain of the claimants was invalid as being an *ex post facto* law and a law impairing the obligation of contracts. The first part of the argument Justice Paterson finds to be without merit. The second he upholds.

the assembly would have the power to rectify a breach of trust or "such misconduct in the corporation, as should be plainly detrimental to the public good." But the establishment of a right of appeal to the governor and council from any sentence given by authority of the college "would take the government of the college wholly out of the hands of those in whom it was originally vested; and be contrary to the charter." The doctrine of contract was not specifically invoked. Benjamin Trumbull, *A Complete History of Connecticut* (1797), II, 327-33.

⁴³ This case is not printed in the reports. It was discovered in the records of the Federal District Court for Rhode Island by Mr. Charles Warren. See his *Supreme Court in United States History* (1922 ed.), I, 67. At least six newspapers of the time gave accounts of the decision.

⁴⁴ 2 Dallas 304 (1795).

But if the confirming act be a contract between the Legislature of Pennsylvania and the Connecticut settlers, it must be regulated by the rules and principles, which pervade and govern all cases of contracts; and if so, it is clearly void, because it tends, in its operation and consequences, to defraud the Pennsylvania claimants, who are third persons of their just rights; rights ascertained, protected, and secured by the Constitution and known laws of the land. The plaintiff's title to the land in question, is legally derived from Pennsylvania; how then on the principles of contract could Pennsylvania lawfully dispose of it to another? As a contract, it could convey no right, without the owner's consent; without that, it was fraudulent and void.⁴⁵

In short, Justice Paterson, who had been an influential member of the Federal Convention, seems here to assume the validity of the principle defended by Marshall in *Fletcher v. Peck*. Another circuit court decision, of which there is no official record, apparently held invalid a Vermont statute authorizing the selectmen of each town to take possession of all church land as being contrary to the contract clause.⁴⁶

Several years later Chief Justice Parsons of Massachusetts took an opportunity to express certain views concerning the rights of corporations which were later to be the basis of many Supreme Court decisions under the contract clause. This case involved the right of a turnpike company to erect a gate on an existing highway.⁴⁷ Parsons stated that grants should be construed to favor the public, and on a reasonable construction of this grant the corporation did not have the right here in litigation. The applicability of the contract clause was not argued by counsel, although it had been claimed that a general statute affecting turnpikes violated the *ex post facto* provision. Parsons did not expressly mention the contract clause in his opinion, but in what is clearly a dictum he said that rights legally vested in a corporation cannot be "controuled or destroyed by a subse-

⁴⁵ 2 Dallas 320. For Justice Paterson's statement of the theory of judicial review, see the same, 308-09.

⁴⁶ Warren, *The Supreme Court*, I, 69. This decision, given in 1799, seems to have been reported only in a local paper. Its similarity to *Terrett v. Taylor*, 9 Cranch 43 (1815), is particularly interesting. *Infra*, p. 38.

⁴⁷ *Wales v. Stetson*, Treasurer of the Blue Hill Turnpike Corp., 2 Mass. 143 (1806).

quent statute, unless a power be reserved to the legislature in the act of incorporation."

The Yazoo Land Sale and Its Repeal. If these expressions of opinion all serve to indicate either an unattached desire to have limitations imposed upon the power of legislatures to restrict their own former acts or a broad interpretation of the contract clause, it was the action of Georgia in attempting to repeal its great land grant of 1795 which gave the opportunity for the first decisive expression of opinion as to the scope of that clause. By act of January 7, 1795, the Georgia legislature directed the sale of an enormous area of land comprising most of what are now the states of Alabama and Mississippi to four land companies.⁴⁸ The passage of the measure was secured by open and wholesale bribery. With but one exception every member of the legislature voting for the measure appears to have sold his vote for money or for shares of stock. Very quickly the story of this sale was spread throughout the state. Denunciation of the so-called "Yazoo" land sale became the customary basis of every meeting. A mob marched on the state capitol and threatened the life of the offending legislators. And when a new legislature was elected almost every member was pledged to vote for the revoking of the sale. When the legislature convened in the winter of 1795-96 one of its first acts was a bill repealing the sale made the previous year.

The Opinion of Hamilton. That attempt at repeal led eventually to *Fletcher v. Peck*, but before the decision in that case the repeal act had been the occasion for a statement on the validity of the revocation by the one man in America who, more than any other, dominated the thinking of John Marshall. The land companies had already sold millions of acres of the Yazoo lands to speculators and prospective settlers in distant parts of the country, particularly New England. Some of these purchasers immediately secured from Alexander Hamilton, then

⁴⁸ An admirable account of this whole story is given in A. J. Beveridge, *Life of John Marshall* (1919), III, ch. X. For a more extensive historical account of the transaction see C. H. Haskins, *The Yazoo Land Companies* (1891).

practicing law in New York, a written opinion as to the validity of the land titles, and particularly of the rescinding act. Hamilton wrote that, never having examined the title of the state of Georgia to the lands,⁴⁹ he could only assume its validity; assuming that validity as a fact, the revocation is void. So closely does Marshall's subsequent opinion follow the reasoning of Hamilton that it is desirable to print Hamilton's argument in his own words:

Without pretending to judge of the original merits or demerits of the purchasers, it may be safely said to be a contravention of the first principles of natural justice and social policy, without any judicial decision of facts, by a positive act of the legislature, to revoke a grant of property regularly made for valuable consideration, under legislative authority, to the prejudice even of third persons on every supposition innocent of the alleged fraud or corruption; and it may be added that the precedent is new of revoking a grant on the suggestion of corruption of a legislative body. Nor do I perceive sufficient ground for the suggestion of unconstitutionality in the first act.

In addition to these general considerations, placing the revocation in a very unfavorable light, the Constitution of the United States, article first, section tenth, declares that no state shall pass a law impairing the obligations of contract. This must be equivalent to saying no state shall pass a law revoking, invalidating, or altering a contract. Every grant from one to another, whether the grantor be a state or an individual, is virtually a contract that the grantee shall hold and enjoy the thing granted against the grantor, and his representatives. It, therefore, appears to me that taking the terms of the Constitution in their large sense, and giving them effect according to the general spirit and policy of the provisions, the revocation of the grant by the act of the legislature of Georgia may justly be considered as contrary to the Constitution of the United States, and, therefore null. And that the courts of the United States, in cases within their jurisdiction, will be likely to pronounce it so.⁵⁰

⁴⁹ This title was more than doubtful. The title of the Indians living in the area had not been extinguished, and under the Constitution only the Federal Government could deal with the tribes. Cf. the opinion of Marshall, C. J., in *Worcester v. Georgia*, 6 Pet. 515 (1832).

⁵⁰ The opinion is reprinted in Robert Goodloe Harper, *The Case of the Georgia Sales on the Mississippi, Considered with a Reference to Law Authorities and Public Acts* (Philadelphia, 1799), pp. 88-89. In this pamphlet the opinion is incorrectly dated March 25, 1795. It should, of course, be 1796, the repeal act

Opinions Expressed in Congressional Debates. We shall return to consider the parallel between the opinions of Marshall and Hamilton later. In addition to this statement from Hamilton it is necessary to consider certain speeches made in Congress some ten years after the Yazoo sales. In 1797 Congress provided for taking over the disputed lands. Georgia received one million two hundred and fifty thousand dollars, and it was agreed that the national government should deal with the Indian claims and with those of the British and Spanish, and reserve five million acres for the purpose of quieting all other claims. Very quickly those who had purchased land in the region turned to Congress. The commissioners who had negotiated the transfer to the central government were directed to investigate the validity of the claims. They found the titles of the purchasers to be invalid, but recommended that nevertheless Congress should appropriate part of the five million acres to satisfy the claims, since most of the claimants had purchased in good faith, and the matter could not otherwise be justly and lastingly settled.⁵¹ When a bill to carry this recommendation into effect came before Congress, it was fiercely attacked by John Randolph.⁵² If the representatives of the people have betrayed their trust, he declared, the people have an inalienable right to abrogate the act of betrayal. The rescinding act was in accordance with the constitutions of Georgia and of the United States. After a heated debate both Randolph's resolution forbidding the use of any part of the five million acres to satisfy claims of the land purchasers and the proposal of the commission were postponed until the next session.⁵³

In that session a bitter controversy over the compensation of the Yazoo claimants took place. For our purposes it is most significant that the point of view expressed by Hamilton in 1796

itself having been passed in January 1796. Harper, a member of one of the land companies involved, also argues that the attempted revocation is invalid as an impairment of a contract (*ibid.*, pp. 50 *et seq.*).

⁵¹ *American State Papers, Public Lands*, I, 132 *et seq.*

⁵² *Annals of Congress*, 8th Cong., 1st Sess., 1039.

⁵³ *Ibid.*, pp. 1099 *et seq.*, 1131-70.

was several times stated in the debates. Most of the argument ranged about the question of the alleged corruption and its relation to the validity of the titles given to the land companies, and by them passed on to third parties. But it was not always sufficient for those who believed that compensation was due the innocent purchasers to assert that the original sale was a valid one. Nor did many of them wish to go to the other extreme and admit the invalidity of the sale, because of fraud, and yet insist that in the interest of fairness the innocent purchasers should be recompensed at national expense. Then as now it was frequently advantageous in argument to give to the contention a constitutional justification. With this objective in view Findley of Pennsylvania declared that

as long as we pay respect to Constitutional obligations and the distribution of the powers of Government, and as long as we respect the Federal Constitution, which expressly asserts that no *ex post facto* law, or law impairing the obligation of contracts, shall be made, we must agree that one session of a Legislature cannot annul the contracts made by the preceding session.⁵⁴

Another speaker colorfully described the Georgia legislature of 1796 as "disregarding the sacred nature of contracts, setting at defiance the Constitution of the United States, which declares that 'no State shall pass any *ex post facto* law, or law impairing the obligation of contracts' . . . and sporting with the rights of innocent individuals."⁵⁵ It "erected the funeral pyre, bound the helpless victim and laid it upon the altar."

It is not without significance that these and other declara-

⁵⁴ *Annals of Congress*, 8th Cong., 2d Sess., 1083. For another statement by Findley see p. 1163. At another time the same speaker made a distinction between charters of privileges (here he was speaking of the charter of the Bank of North America) and contracts by which property is transferred. The former are always subject to legislative discretion, the latter not (*ibid.*, p. 1088). According to this theory *Fletcher v. Peck* was correctly decided, but the *Dartmouth College* decision was wrong.

⁵⁵ Mr. Root, *ibid.*, p. 1096. Even admitting for argument's sake that the original sale was fraudulent, he went on, "and that it is competent to a legislative or judiciary tribunal to inquire into the motives which influenced a prior Legislature in making a contract," the purchase is good in the hands of subsequent purchasers who had no notice of the fraud.

tions of the relevancy of the contract clause⁵⁶ were met by John Randolph and his followers, who opposed paying the claims, not with the denial that the contract clause prevented states from revoking their land grants but rather with the argument that no valid contract had been made. It is not that a state cannot make a binding contract, but that one had not been made here. "We deny," said Randolph, "that any contract has been, or could be made under such circumstances — that fraud is a basis on which a contract can be erected."⁵⁷ He seems implicitly to admit what one of his followers explicitly states: "If, as an agent, it [the legislature] made a contract that was fair, or perhaps feasible, and within their powers of agency, it would be binding upon the principal. Such is the doctrine of agency in public as well as in private life."⁵⁸

After four days of debate the resolution for the compensation of the claimants passed the House, although the bill to give effect thereto failed to carry. And in the immediately following sessions the claimants were similarly unsuccessful in securing relief.⁵⁹

It is apparent then that although there was no Supreme Court case involving the interpretation of the contract clause before 1810, John Marshall was by no means the first American to attach a broad meaning to the clause. The early theories of Paine and Wilson concerning the repeal of charters doubtless had little, if any, direct influence. But the opinions of Justice Paterson in the case of Vanhorne's Lessee, and the dictum of Chief Justice Parsons in the Blue Hill Turnpike case would seem to be perfectly possible precedents. The acceptance, whether implicit or explicit, of a broad interpretation of the clause in Congressional debates must have been known to Marshall. And,

⁵⁶ See, e.g., *ibid.*, pp. 1143, 1170.

⁵⁷ *Ibid.*, p. 1100.

⁵⁸ Mr. Nelson, *ibid.*, p. 1149.

⁵⁹ An appropriation of five million dollars was finally voted in 1814 to reimburse the purchasers of the Yazoo lands (*Annals*, 13th Cong., 2d Sess., 1925; *U. S. Statutes at Large*, III, 117).

above all, the opinion of Alexander Hamilton was set forth in a published pamphlet, and Hamilton's views invariably carried more weight with Marshall than those of any other man. The theory of the contract clause set forth in these places need not have been followed by the Supreme Court. Even before the publication of Madison's *Notes* there was evidence, as in the *Federalist* and in certain of the other published records of the ratification controversy, that the clause referred only to private contracts. But, in view of Marshall's distrust of state legislatures, and his ardent desire to secure further protection for the rights of property, it is not surprising that the Supreme Court under his domination should have given to the clause a meaning far broader than any which its framers ever attached to it.

CHAPTER II

MARSHALL AND THE EXPANSION OF THE CONTRACT CLAUSE

The Economic Attitude of John Marshall. It is safe to assert that the contract clause as the Framers thought of it was a very different thing from the clause at the end of Marshall's years on the Supreme Court. No one can be sure how important a place in American constitutional law and economic history the clause would have had if Jefferson, rather than Adams, had appointed a Chief Justice in 1801. Not all of the interpretations just cited were of Federalist authorship. The Court with a Republican Chief Justice probably would have given a broader meaning to the clause than was foreseen in 1787. It might have held that public contracts as well as contracts between private persons come within the scope of the clause. But it is doubtful whether a Jeffersonian would have been so thoroughly imbued with the Hamiltonian distrust of legislative interferences with the rights of private property. And it is unlikely that an appointee of Jefferson's would have ruled against so many acts passed by Republican legislatures. Consequently it seems reasonable to believe that the work of writing into the texture of the Constitution the tenets of Hamiltonian economic theory depended upon the chance of an appointment to the judicial post which before 1801 had been of little significance.

Marshall's contract opinions have frequently been considered, both before and since 1835, as another illustration of his nationalism. That is correct, but it is an almost accidental characteristic. We live in an age in which the national government is increasingly concerned with the regulation of economic and social life in the interest of the underprivileged members of the community. This was true even during the Republican administrations of the nineteen-twenties. But it was rarely the case be-

fore the Civil War. National economic legislation before that period was usually in the interests of the banking-commercial class. Of this the protective tariff and the Bank of the United States are notable examples. They are illustrations of belated mercantilism rather than of either *laissez faire* or social legislation. So long as Congress enacted statutes of this kind nationalism and the interest of the class for which Hamilton spoke went hand in hand. On the other hand, much of the early state legislation was obnoxious to the same men who favored the national legislation which favored them. Alexander Hamilton was the political leader of these nationalists, as well as their spokesman, and Marshall was the greatest of his disciples. As Beveridge shows, he was in the Virginia Constitutional Convention of 1829-30 the "supreme conservative."¹ The views he there expressed were, at bottom, those which he had been writing into American constitutional law for a generation.

No group of his cases so well illustrates his conservatism as does that concerned with the contract clause. By employing a far broader conception of contract than had been prevalent in 1787, and by combining this conception with the principles of eighteenth-century natural law,² he was able to make of the contract clause a mighty instrument for the protection of the rights of private property. His personal dominance of the Court, at least until 1827, made it possible for him to give to that clause a breadth of meaning which not only exceeds that intended by the Framers, but also goes beyond the views expressed by Wilson, Paine, the members of Congress who took part in the Yazoo lands debate, and even Paterson and Hamilton. His four great contract opinions³ written between 1810 and 1819 are among the most important opinions, economic as well as legal, which have ever come from the Supreme Court. Had he been able to

¹ *Life of Marshall*, IV, ch. IX.

² See the interesting article of Nathan Isaacs, "John Marshall on Contracts," 7 *Virginia Law Rev.*, 413 (1921). For a more nearly contemporary view see T. M., "Obligation of Contracts," 24 *American Jurist*, 257 (1841).

³ *Fletcher v. Peck*, 6 Cranch 87 (1810), *New Jersey v. Wilson*, 7 Cranch 164 (1812), *Sturges v. Crowninshield*, 4 Wheat. 122 (1819), *Dartmouth College v. Woodward*, 4 Wheat. 518 (1819).

carry the Court with him in *Ogden v. Saunders* ⁴ the scope of the clause would have been extended even further and his success would have been complete. For lack of one more vote he fell short of his goal, but his accomplishment was a remarkable one.

Although Marshall did not have an opportunity to give an interpretation of the contract clause until the case of *Fletcher v. Peck*, there is an earlier opinion which indicates his previous acceptance of the basic principle in the case involving the Yazoo lands. In *Huidekoper's Lessee v. Douglas* ⁵ the Court was asked to construe the meaning of a Pennsylvania act of April 3, 1792, providing for the sale of lands in the western part of the state. There was no subsequent act, and no question of the impairment of contract. But after a brief consideration of the intent and wording of the statute, Marshall used these significant words:

This is a contract, and although a state is a party, it ought to be construed according to those well established principles which regulate contracts generally.

The state is in the situation of a person who holds forth to the world the conditions on which he is willing to sell his property.

If he should couch his propositions in such ambiguous terms that they might be understood differently, in consequence of which sales were to be made, and the purchase money paid, he would come with an ill grace into Court, to insist on a latent and obscure meaning, which should give him back his property, and permit him to retain the purchase money. All those principles of equity, and of fair dealing, which constitute the basis of judicial proceedings, require that courts should lean against such a construction.⁶

The point of view implied, as well as that expressed, in this opinion was soon to be set forth in one of the most important decisions ever handed down by the Supreme Court.

Fletcher v. Peck and the Doctrine that a State May Not Rescind Its Grants. Even before the repeated failure of Congress to come to the aid of the purchasers of the Yazoo lands, some

⁴ 12 Wheat. 213 (1827).

⁵ 3 Cranch 1 (1805).

⁶ *Ibid.*, pp. 70-71.

of them were engaged in attempting to get a decision from the Supreme Court on the validity of the repeal act. The Eleventh Amendment prevented a suit against the State of Georgia. Finally they got around this difficulty by arranging a friendly suit. In 1803 one John Peck of Boston, a dealer in Georgia lands, sold or professed to sell to one Robert Fletcher of New Hampshire a tract of the lands in dispute.⁷ Fletcher then brought suit against Peck for the recovery of the purchase price on the ground that the latter's title, contrary to the covenant in the deed, was not sound. Fletcher alleged that, in the first place, Georgia could not validly sell the lands, that, in addition, the sale was charged with fraud, and that the sale had been revoked by the state. From an adverse decision in the circuit court Fletcher brought the case to the Supreme Court on a writ of error. The case was twice argued before that Court, there being no decision the first time because of a defect in the pleadings.⁸ In the first argument, counsel for Peck were Robert Goodloe Harper and John Quincy Adams, in the second, Harper and Joseph Story. Although most of their argument was directed to proof of the validity of Georgia's title and to arguing that the purchasers now before the court were innocent of any fraud, there was an emphatic statement that the attempted repeal of the act providing for the sale was invalid as a violation of the constitutional prohibition against the impairment of contracts.⁹

In his opinion Marshall did not even consider the question of Georgia's title to the western lands.¹⁰ He did take note of the argument that the original sale was procured by fraud but ruled that this was not a proper subject of judicial inquiry.¹¹ He does

⁷ *Fletcher v. Peck*, 6 Cranch 87 (1810).

⁸ *Ibid.*, p. 125.

⁹ "The legislature was forbidden by the constitution of the United States to pass any law impairing the obligation of contract. A grant is a contract executed, and it creates also an implied executory contract, which is, that the grantee shall continue to enjoy the thing granted according to the terms of the grant" (*ibid.*, p. 123).

¹⁰ See, however, Justice Johnson's discussion of the point in his concurring opinion (*ibid.*, pp. 145-46).

¹¹ Professor Corwin, in his excellent analysis of this case (*John Marshall and the Constitution*, p. 152), has pointed out that, in the usual case where fraud is

not mention the patent fact that the case was moot, that it was to the interest of both parties to have the original sale upheld and the rescinding act declared invalid.¹² Ordinarily such a case would not be heard. But Marshall, like the parties to this suit, desired to have a judicial determination of the validity of the repeal act,¹³ and he wished to base that decision on the contract clause, or at least partially on that clause, for he followed Hamilton in hesitating to decide on that ground alone, just as, with less justification, he followed Hamilton in assuming the validity of Georgia's title to the land.¹⁴ Like Hamilton, he considered the injustice of the repeal act to the innocent purchasers from the land companies, rather than the effect of the original fraud upon the validity of the companies' title. And it is particularly interesting to watch the way in which he wavers between reliance upon the contract clause and upon principles of justice. Consider these adjoining paragraphs in Marshall's opinion:

charged, the point of view of Marshall is clearly sound. But here there is room to doubt the correctness of his ruling, for the fraud was of universal notoriety; the scandal was the greatest one of the time.

¹² Again Johnson considers this point, although unsatisfactorily. After saying that it appears to be a "mere feigned case," he adds that his respect for the counsel in the case "has induced me to abandon my scruples, in the belief that they would never consent to impose a mere feigned case upon this Court" (6 Cranch 147-48). "The conclusion seems inescapable that had not Jefferson, who placed Johnson on the Supreme Bench, and Jefferson's Secretary of State and political legatee, James Madison, ardently desired the disposition which Marshall made of the case, Justice Johnson would have placed on record a stronger statement of the nature of the litigation" (Beveridge, *Life of Marshall*, III, 592-93).

¹³ It is not entirely irrelevant to point out that although Marshall was not interested in the Yazoo lands he was personally concerned in other land speculations. His great biographer, who was also one of his warmest admirers, has well stated the situation: "Moreover, Marshall was profoundly interested in the stability of contractual obligations. The repudiation of these by the Legislature of Virginia had powerfully and permanently influenced his views upon this subject. Also, Marshall's own title to part of the Fairfax estate had more than once been in jeopardy. At that very moment [of the debates in Congress over relief to the Yazoo claimants] a suit affecting the title of his brother to certain Fairfax lands was pending in the Virginia courts, and the action of the Virginia Court of Appeals in one of these was soon to cause the first great conflict between the highest court of a State and the supreme tribunal of the Nation. No man in America, therefore, could have followed with deeper anxiety the Yazoo controversy than did John Marshall" (Beveridge, *op. cit.*, III, 582).

¹⁴ *Supra*, p. 22.

When, then a law is in its nature a contract,¹⁵ when absolute rights have vested under that contract; a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.

It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?¹⁶

After thus appearing to assume the relevancy of the contract clause, then returning to consider the less tangible limitations imposed upon the legislative power, "by the nature of society and of government," he says, in that remarkably effective use of weak and indecisive terms to which he sometimes resorted when he wished to slip in an unnoticed premise, "The validity of this rescinding act, then, might well be doubted, were Georgia a single sovereign power."¹⁷ But Georgia is not a sovereign state. It is a part of the union and limited by the national constitution. That constitution prohibits any state from passing a bill of attainder, *ex post facto* law, or law impairing the obligation of contracts. Is the grant a contract? Here Marshall follows the principle stated by Hamilton and by counsel, that a grant is a contract executed, and that the grant contains an implied contract that the grantor will not reassert his right over the thing granted. Such a theory gains little support from the ordinary understanding of "obligation of contract" — the obligation to perform or fulfill the terms of an executory contract. But it is not unreasonable to agree that when a grant is made both parties assume that it will endure.

The critical point of his argument is in answering the question, Does a contract to which a state is a party, a public, not a private contract, fall within the prohibition of the contract clause? The Framers of the Constitution and those who sup-

¹⁵ This is before the point in the argument where he contends that the original grant was a contract.

¹⁶ 6 Cranch 87, 135.

¹⁷ *Ibid.*, p. 136.

ported it in 1787-1788 never gave any indication of such a breadth of meaning. Marshall did not have access to the debates in the Federal Convention, but he did have certain contemporary statements in the debate over ratification, and, in particular, the 44th *Federalist*. On the other hand, two members of the convention, Paterson and Hamilton, had more or less clearly stated that a state is bound by its contracts. Similar statements had been made in the Yazoo lands debate in Congress, and those debates were published in the Washington newspapers. Marshall was not without authorities to support the view that he undoubtedly wished to take. But here, as in nearly all of his great opinions, he cites no authorities to support his theory. Rather does he prefer to assert that the words of the Constitution "are general and are applicable to contracts of every description."¹⁸ He refers to the apprehensions of the Framers concerning the legislative follies of the years preceding 1787, but as he perfectly well knew, and later said,¹⁹ their apprehensions, so far as they are related to the contract clause, had to do only with legislative interference in private contracts.

It is evident that he was not entirely satisfied with his application of the contract clause. For after the brief consideration of that clause's meaning, astonishingly brief when one considers how far-reaching this interpretation was to be, he talks vaguely about the bills of attainder and *ex post facto* provisions. This was a civil suit; no one involved was accused of a crime. But in spite of the decision in *Calder v. Bull*²⁰ Marshall apparently de-

¹⁸ *Ibid.*, p. 137.

¹⁹ See especially the statement in *Ogden v. Saunders*, 12 Wheat. 213, 354, 355 (1827): "The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposed to be proper for his own exclusive management, had been used to such an excess by the state legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man." See also his *Life of Washington*, V, 85-6.

²⁰ 3 Dall. 386 (1798). Ordinarily students of this subject have considered only Justice Chase's opinion holding that the *ex post facto* clause applied exclusively to criminal legislation. Justice Chase was not a member of the Federal Convention, but Justice Paterson was and he also gave an opinion. After pointing out that the inclusion of the contract clause in the same section as the *ex post facto*

sired to base his decision upon the theory that the repeal act was *ex post facto*, and somehow he seems to have felt that that act was in the nature of a bill of attainder. He does say that the principle of these provisions has been violated,²¹ and although in the next paragraph he reverts to the obligation of contract his famous concluding paragraph places reliance upon no single constitutional clause. Indeed, it is principally indicative that he was uncertain as to precisely why the repeal act was invalid, although he was very sure that it was invalid.

It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the State of Georgia was restrained, either by general principles, which are common to our free institutions, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.²²

New Jersey v. Wilson and the Doctrine of Immunity from Taxation. Any lingering doubts that Marshall had in 1810 about

clause indicated that the latter was not intended to apply to civil legislation he said: "I had an ardent desire to have extended the [*ex post facto*] provision of the Constitution to retrospective laws in general. There is neither policy nor safety in such laws; and therefore, I have always had a strong aversion against them. It may, in general, be truly observed of retrospective laws of every description, that they neither accord with sound legislation, nor the fundamental principles of social compact. But on full consideration, I am convinced, that *ex post facto* laws must be limited in the manner already expressed; they must be taken in their technical, which is also their common and general acceptation, and are not to be understood in their literal sense" (*ibid.*, p. 397). As late as 1829 Justice Johnson had a note published in the Court's reports criticising the holding in *Calder v. Bull*. See 2 Peters 681-87. The views expressed in 1787-88 have been referred to *supra*, p. 10, n. 21. For a discussion of the earlier material on this subject see Oliver P. Field, "*Ex Post Facto* in the Constitution," 20 *Michigan Law Rev.*, 315 (1922).

²¹ "The rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?" 6 Cranch 138-39.

²² 6 Cranch 139. For critical analyses of Marshall's reasoning in this case see William Trickett, "Is a Grant a Contract? A Review of *Fletcher v. Peck*," 54 *American Law Rev.*, 718 (1920), and H. H. Hagan, "*Fletcher v. Peck*," 16 *Georgetown Law Journal*, 1 (1927).

the scope of the contract clause were resolved long before the end of his tenure of office. Of that his later cases afford ample evidence. Indeed, within two years he had in one of the most interesting of his contract cases expanded the contract clause even beyond the expressed theories of Hamilton and Paterson and had set forth the doctrine that this clause serves, under certain circumstances, to prevent a state from exercising one of its most necessary powers, that of taxation. The situation producing the strange case of *New Jersey v. Wilson*²³ has origins antedating, among the great contract cases, even those of the Dartmouth College controversy. In 1758 the New Jersey colonial legislature passed an act to give effect to an agreement between the Delaware Indians and commissioners appointed by the colony. According to this the Indians relinquished their claim to all lands within the colony, in consideration of the purchase for them of a tract of land on which they might reside in the future. In the act it is stipulated that the new tract is to be perpetually exempt from taxation by the colony. In 1801 the Indians, wishing to move to New York, secured consent of the legislature to sell the land. Three years later the legislature repealed the provision of the act of 1758 granting immunity from taxation, and demanded from the new owners the payment of regular state taxes. When the resulting cause came before the New Jersey Supreme Court,²⁴ counsel for the defendants argued that private laws or charters are contracts,²⁵ that the contract here in question had been impaired, since the exemption ran with the land and was not personal to the Indians. Counsel for the State argued that a perpetual exemption had been given only because the Indians were forbidden to alienate the land,

²³ 7 Cranch 164 (1812).

²⁴ *State v. Wilson*, 1 Pennington (New Jersey) 300 (1807).

²⁵ In support of this position counsel cited Blackstone, *Commentaries*, I, 85; II, 345-46. On p. 85 of vol. I Blackstone speaks of the written laws of the kingdom and says that the oldest of which there is record is Magna Charta. On p. 345 of vol. II he is discussing private acts of Parliament regarding estates and, on the next page, grants by the crown. All grants are letters patent, that is, matters of public record. There is no statement even tending to support the argument of counsel.

and that if the provision for non-alienation could be repealed so could the provision for tax exemption. Counsel also argued that a perpetual exemption from taxes was void. The state court followed this argument to the extent of saying that the exemption was never distinct from Indian possession. It was granted to prevent the seizure of their land for taxes. The reason for the exemption having ceased, the exemption no longer existed.²⁶ The contract clause is not involved.

With the reasoning of the state court Marshall flatly disagreed. He held that the exemption was not simply a personal benefit but was annexed to the land, and, although New Jersey could have made the release from the exemption a condition of the sale, it had not done so. Relying upon the doctrine in *Fletcher v. Peck*, that a state is, under the contract clause, bound by its contracts, he held the act of 1804 void.²⁷

In his opinion in the New Jersey case Marshall does not even mention the question of policy involved in the issue: May one legislature permanently, or for a very long period, bargain away the taxing power of the state over a given subject? Taxation is not only one of the sovereign powers of any state; it is an indispensable power. Yet Marshall was so desirous of placing limitations upon state legislatures to the end of protecting the vested rights of property that he did not even pause to consider the handicap to state financial powers that this principle might produce. Although, as will later be indicated,²⁸ individual members of the Court have asserted their disagreement with the principle that the power of taxation may be alienated, the doctrine of the New Jersey case has never been repudiated by the Court.

²⁶ The Court further remarked, "To say, that the purchasers paid more for the land than they otherwise would have done, under an expectation that they were to be perpetually exempt from a land tax, is paying no compliment to the understandings of the enlightened yeomanry of Burlington county."

²⁷ Some measure of the uncertainty as to the scope of the prohibitions of Article I, Section 10, which is found in *Fletcher v. Peck* is to be found in this opinion. The bill of attainder and *ex post facto* clauses are mentioned along with the contract clause, although there is no separate consideration of their applicability. 7 Cranch 164, at 166. By 1819 they are no longer mentioned in cases of this kind. The inclusiveness of the contract clause had come to be accepted.

²⁸ *Infra*, p. 75.

But in a ruling handed down seventy-four years later the decision regarding the exemption of the particular land involved was changed.²⁹ From this case it appears that taxes had been assessed and collected on the land since about 1814.³⁰ Finally one of the owners protested the constitutionality of the tax, arguing that the exemption contained in the original act, as sustained by the Supreme Court, could not be repealed by non-user. The state argued that *New Jersey v. Wilson* had been decided without argument and on an incomplete statement of facts.³¹ Justice Bradley for the Supreme Court held that since the taxes had been paid from 1814 to 1876 the state government was entitled to presume a surrender of the exemption. At common law, franchises and easements could be lost by non-user for over twenty years. Of particular interest is his observation that the Court is not disposed to question the earlier case, but that if the question were a new one great weight would be given to the reasoning of the New Jersey judges, since there is needed the clearest legislative expression in order to impair the taxing power of the state.

Even Marshall, however, might have agreed with the last of these statements, for its origin is to be traced to his decision in *Providence Bank v. Billings*.³² In 1791 Rhode Island granted to certain individuals a charter to carry on a banking business. Then, in 1822, a tax was imposed on the paid-in capital of banks. The Providence Bank claimed that the state had by this tax impaired the obligation of its contract with the corporation. Counsel for the bank also relied upon the doctrine in *McCul-*

²⁹ *Given v. Wright*, 117 U. S. 648 (1886).

³⁰ The Record contains a series of affidavits of assessors and owners who had collected and paid taxes over a long period of years, many containing statements that they had never heard of any tax exemption until about 1876.

³¹ The Attorney General of New Jersey argued that the original contract was superseded by the statute of 1796 providing that commissioners were to be appointed to take charge of the lands and lease them for the benefit of the Indians. Justice Bradley replied that this statute had not been brought to the attention of the Court in *New Jersey v. Wilson* and it would not now decide whether a consideration of the statute by the Court in 1812 would have changed the result.

³² 4 Peters 514 (1830).

*loch v. Maryland*³³ of the exemption of government instrumentalities from taxation. Marshall refused, however, to extend either of his doctrines so as to hold this tax invalid. The relinquishment of the power of taxation should never be implied. Since the corporate charter merely serves to give individuality to a group, "any privileges which may exempt it from the burdens common to individuals do not flow necessarily from the charter, but must be expressed in it, or they do not exist."³⁴ *McCulloch v. Maryland* is distinguished on the ground that the state was there attempting to tax a subject beyond its jurisdiction.³⁵

Terrett v. Taylor and the Principles of Natural Justice. Shortly after *New Jersey v. Wilson* comes the puzzling case of *Terrett v. Taylor*.³⁶ Puzzling, because here the Court does not apply the contract clause, although in view of the Marshall court's latitudinarian views of that clause it might easily have done so, and the case has, in fact, often been cited by the Court as a contract case.³⁷ In the case the Court, speaking through Justice Story, held unconstitutional certain acts of Virginia denying the title of the Episcopal Church in that state to land owned by it, and appropriating those lands to the state. The lands were not originally given by the colony or state to the church, but by act of 1776 the church's title was confirmed. The Court said:

But that the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith

³³ 4 Wheat. 316 (1819).

³⁴ 4 Peters at 562.

³⁵ This decision was anticipated by that in *Portland Bank v. Apthorp*, 12 Mass. 252 (1815). Here the Massachusetts court refuses to declare the tax unconstitutional, but appears to assume the possibility of a grant of immunity from taxation. No reference is made to *New Jersey v. Wilson*. For a contemporary criticism of the decision in *Providence Bank v. Billings* see Joseph K. Angell and S. Ames, *Private Corporations* (Boston, 1832). Angell had, in 1827, published a pamphlet arguing against the Rhode Island tax. He says that a state must reserve the power to tax when it grants a charter or else the corporation is to be considered exempt from future taxes.

³⁶ 9 Cranch 43 (1815).

³⁷ See, e.g., *Piqua Branch Bank v. Knoop*, 16 How. 369, 389 (1853); *Von*

of previous laws, and by such repeal can vest the property of such corporations exclusively in the state, or dispose of the same to such purposes as they may please, without the consent or default of the corporators, we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution of the United States, and upon the decisions of most respectable tribunals, in resisting such a doctrine.³⁸

Which letter and which decisions are not made clear. The act of 1776 was not a grant, and evidently even the Marshall court was hesitant to call it a contract. But if it was not a contract, where in the national Constitution does one find an applicable clause?

Dartmouth College v. Woodward and the Principle that a Charter is a Contract. In the February term of 1819 the Court decided three great cases, *Sturges v. Crowninshield*,³⁹ *McCulloch v. Maryland*,⁴⁰ and *Dartmouth College v. Woodward*.⁴¹ The second dealt with the powers of the national government and the right of the states to tax an instrumentality thereof. The first and second dealt with the contract clause, and while the very broad implications of the *Sturges* case were limited some eight years later,⁴² the principle of the *Dartmouth College* case was to be one of the major factors in the relation between government and economic life in the nineteenth century. The greatest extension of the contract clause was made when contracts to which a state is party, and executed as well as executory contracts, were brought within its terms. But it remains true that in the *Dartmouth College* case, for the first time, a corporate charter was held to be a contract. And that ruling, with the rapid growth of the corporate form of industrial organization, made possible a breadth of application for the clause

Hoffman v. Quincy, 4 Wall. 535, 550 (1867); Pennsylvania College Cases, 13 Wall. 190, 213 (1872); Miller v. New York, 15 Wall. 478, 489 (1873).

³⁸ 9 Cranch 43, 52 (1815).

³⁹ 4 Wheat. 122 (1819).

⁴⁰ 4 Wheat. 316 (1819).

⁴¹ 4 Wheat. 518 (1819).

⁴² *Infra*, pp. 48-52.

which would have astonished most, if not all, of those who voted for its adoption in 1787 and 1788.

Several of Marshall's most influential decisions, paradoxically, involved immediately issues of slight or purely local importance. In *Marbury v. Madison* ⁴³ the office at stake was so insignificant in power and compensation that a number of those to whom the same kind of office had been offered declined to serve.⁴⁴ In *Fletcher v. Peck* the decision came many years after Georgia had transferred whatever title it had to the lands in question to the national government. The Dartmouth College case involved, not a financial or industrial corporation, but a small New England college. And not its extinction, simply its control. This college, it will be remembered, was chartered by the crown in 1769, Governor Wentworth signing on behalf of George III. Intended primarily as a seminary for the education of youthful Indians, it had become a college for white Americans. So far as appears, Indians were not excluded, but when the great controversy developed in 1816 there were no Indians in attendance.

In 1815, following a schism in the board of trustees and the ousting of President Wheelock, son of the founder, the college question became involved in New Hampshire politics.⁴⁵ The Republicans sided with Wheelock, the Federalists with the trustees. A Republican majority in the legislature passed, in June of 1816, an act changing the name of the college to Dartmouth University, increasing the Board of Trustees from twelve to twenty-one members and vesting appointment of the new members in the governor and council, and providing for a Board of Overseers, appointed by the governor, with a veto power over acts of the trustees. The new authorities proceeded to oust the former trustees, to reestablish Wheelock as president, and to dismiss the faculty members who remained faithful to the old regime. After an appeal to public sentiment the "Trustees of Dartmouth College" brought suit against William H. Wood-

⁴³ 1 Cranch 137 (1803).

⁴⁴ Beveridge, *Life of Marshall*, III, 125.

⁴⁵ Frederick Chase, *History of Dartmouth College* (1913); J. M. Shirley, *The Dartmouth College Causes* (1879); Beveridge, IV, ch. V.

ward, secretary of the college, who sided with the new administration, for recovery of the college charter, records, seal, and accounts.

In the New Hampshire Court of Appeals the decision went against the plaintiffs.⁴⁶ Although the contract clause argument was presented by counsel for the college, it was not greatly relied upon by them and the state court denied its applicability. The contract clause, said Chief Justice Richardson, was "most manifestly intended to protect private rights only." It was not intended to limit the power of states over "their own civil institutions." A corporation of this kind, "all of whose franchises are exercised for publick purposes, is a publick corporation. . . . The office of trustee of Dartmouth College is, in fact, a publick trust, as much so as the office of governor, or of judge of this court." ⁴⁷

From this decision an appeal was taken to the Supreme Court by writ of error. In their argument before that Court, Webster and Hopkinson for the college relied mainly upon those principles of justice found in all free governments to which Marshall had twice referred in *Fletcher v. Peck*. But the contract clause was not overlooked. *Fletcher v. Peck* and *New Jersey v. Wilson* were both cited.⁴⁸ It was essential that the view of the state court, that an endowed college is a public institution, and as such subject to legislative control, be countered. Much of Webster's argument went to defending the principle that the college was "an eleemosynary institution," a "private charity,"

⁴⁶ 65 New Hampshire Rep. 473 (1817). The one comprehensive reprint of the pleadings, argument of counsel, and opinions in both state and national courts is Timothy Farrar's *Report of the Case of the Trustees of Dartmouth College against William H. Woodward* (1819).

⁴⁷ 65 New Hampshire Rep. 473, 628-39. The Chief Justice also said that it would be entirely contrary to sound policy to place control of the institutions of learning in the perpetual control of a few self-perpetuating persons (*ibid.*, p. 641). This view, earlier submitted to Jefferson by Governor Plumer, had been heartily approved by that exponent of educational reform. See his letter to Plumer of July 21, 1816.

⁴⁸ 4 Wheat. 518, 590 *et seq.* In view of Story's failure to refer directly to the contract clause, it is interesting to find Webster saying, "But the case of *Terrett v. Taylor*, before cited, is of all others, most pertinent to the present argument" (*ibid.*, p. 591).

and therefore entirely dissimilar from a municipal or other public corporation.⁴⁹

After the argument was concluded Marshall announced that the members of the Court were of divided opinions and some had not formed their opinions and that the cause would be continued.⁵⁰ Before the opening of the next term of Court the undecided had, with the aid of Chancellor Kent, been won over to the side of the college. In the meantime the defendants, whose cause had been very poorly presented in the hearing of the previous year, had retained William Pinckney. He was present on the opening day of the term, prepared to move for a reargument. But Marshall refused to notice Pinckney, announced that the Court had reached a decision, and began to read his opinion.

Doubtless the essential point in which that opinion differs from the opinion of Chief Justice Richardson of New Hampshire is in holding that the college is a "private corporation," an eleemosynary institution, not a public organization subject to legislative control.⁵¹ But that is a question which from the point of view of American constitutional law is of very limited importance. On the other hand, the holding that a charter of incorporation is a contract protected against legislative infringement by the Constitution is a doctrine which was to be of tre-

⁴⁹ 4 Wheat. 563 *et seq.*

⁵⁰ Marshall and Washington were for the College, Duvall and Todd against it, Livingston and Johnson undecided. Story has usually been classed with the latter but Beveridge is of the opinion that he was definitely with Marshall. See *Life of Marshall*, IV, 255, 257-58, 275.

⁵¹ Marshall agreed with Richardson "that the framers did not intend to restrain the states in the regulation of their civil institutions adopted for internal government, . . . [the contract clause] was never understood to restrict the general right of the legislature to legislate on the subject of divorces" (4 Wheat. 518, at 629). See the same, pp. 634-41, for his defence of the proposition that the College is not a public institution. Counsel on both sides had agreed that the clause had no applicability to "grants of political power" (*ibid.*, pp. 562, 600). Justice Story qualified his general acceptance of this principle by saying that a state could not dismiss an officer appointed for a definite term at a fixed salary, as it could not diminish the salary of a judge appointed during good behavior, nor could it take away the "private property of a public corporation" (*ibid.*, pp. 694-96). For the later application of this principle see *infra*, pp. 220-23.

mendous significance for the development of the corporate form of business in this country. It is probable that, as Professor Corwin has said, if an industrial or financial corporation had been involved in the case, there would have been little doubt on the part of bench and bar that the rule of *Fletcher v. Peck* applied.⁵² Even if we agree that the decisive step was taken in the earlier case when a contract to which a state was party was brought under the contract clause, we should not overlook the importance of the later decision. For in *Fletcher v. Peck* there was clearly a contract, although an executed one. Even in *New Jersey v. Wilson* there was a discernable contract between the Indians and the colonial government. In the Dartmouth College case it was difficult indeed to see in a charter, granted by the crown, a contract, much less one of the sort which could possibly have been in the minds of the Framers. Characteristically Marshall cites no authorities to prove that a charter is a contract. Rather does he rely upon a simplified and inaccurate account of the grant of the charter and upon assertion unsupported by legal authority.

It can require no argument to prove that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application it is stated that large contributions have been made for the object, which will be conferred on the corporation as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely, in this transaction, every ingredient of a complete and legitimate contract is made.⁵³

But the contributions were made to an existing institution, located in Connecticut and known as Moor's Charity School.⁵⁴ The trustees of this school knew nothing of the application for incorporation, and, when the charter was granted, they were indignant about it and regarded the entire scheme as a perver-

⁵² John Marshall and the Constitution, p. 168.

⁵³ 4 Wheat. 627.

⁵⁴ See Shirley, *The Dartmouth College Causes*, pp. 21-4, 415-20; J. F. Orton, "Confusion of Property with Privilege: the Dartmouth College Case," 15 *Virginia Law Register*, 417 (1909).

sion of trust and an attempt to deprive them of their powers. Marshall said that "the funds of the college consisted entirely of private donations,"⁵⁵ ignoring the fact that a grant of land was at the time made by Governor Wentworth, acting for the crown. There were also subsequent grants of land. "This is plainly a contract to which the donors, the trustees, and the crown . . . were the original parties."⁵⁶ It might, with more justification, be said that this was plainly not a contract, since none of the essential characteristics of a contract was present. It was not a contract but a grant made by the king *ex proprio motu*. If the king had wished to make an irrevocable contract with the grantees he could not have done so. Marshall admits that the English Parliament could have annulled the charter, and concedes that "it is more than possible that the preservation of rights of this description was not in the view of the framers of the constitution when the clause under consideration was introduced into that instrument."⁵⁷ However, the first admission only gives him an opportunity to say that "the perfidy of the transaction would have been universally acknowledged," and the second to enumerate an extremely useful rule of constitutional construction:

It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go farther, and to say that had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception.⁵⁸

There is, he continues, "no safe and intelligible ground" on which we can exclude contracts of this kind from the protection

⁵⁵ 4 Wheat. 632. Cf. Shirley, pp. 25 *et seq.*, 419-20.

⁵⁶ 4 Wheat. 643.

⁵⁷ *Ibid.*, pp. 643-44.

⁵⁸ *Ibid.*, pp. 644-45.

intended to be thrown about legal contracts by the Framers of the Constitution. "Why should they be supposed so regardless of contracts made for the advancement of literature as to intend to exclude them from provisions made for the security of ordinary contracts between man and man? No reason for making this supposition is perceived."⁵⁹ It was not intended to leave these eleemosynary institutions, these "donations to education," to be regulated by legislatures as they might see fit. Donors to such institutions assume the security of the organization to which they make gifts to be guaranteed by the act of incorporation. And they are entitled to make this assumption.

Having come to the conclusion that "this is a contract, the obligation of which cannot be impaired without violating the constitution of the United States,"⁶⁰ Marshall proceeds to find that its obligation has been impaired by the acts of the New Hampshire legislature. As the crown was bound by the terms of the charter dealing with the control of the college, and "could have made no violent alteration in its essential terms, without impairing its obligation,"⁶¹ so its successor, the government of New Hampshire, is limited, and, since the adoption of the Constitution of the United States, that limitation is made effective by the contract clause of that document. "It results from this opinion, that the acts of the legislature of New Hampshire . . . are repugnant to the constitution of the United States."⁶²

Justice Washington's relatively brief concurring opinion⁶³ adds little to the arguments of the Chief Justice. Story prepared a characteristically long and learned opinion in which he expressed complete agreement with Marshall's essential conclusions — that a corporate charter is a contract, and that a college is not a public corporation — but his extensive use of common law decisions is no more convincing of the proposition that a

⁵⁹ *Ibid.*, pp. 646-47. The phrase "provisions made for the security of ordinary contracts" is, along with others in Marshall's writings, indicative of his understanding of the purpose of the contract clause.

⁶⁰ *Ibid.*, p. 650.

⁶¹ *Ibid.*, p. 651.

⁶² *Ibid.*, p. 654.

⁶³ *Ibid.*, pp. 654-66.

contract is made when a charter of incorporation is granted than Marshall's simple affirmation to that effect.⁶⁴

Green v. Biddle and Contracts between States. In *Fletcher v. Peck* the Court held that the contract clause applies to a contract between a state and a group of individuals, in *New Jersey v. Wilson* to one between a state and an Indian tribe, and in the Dartmouth College case to the grant of a charter. But per-

⁶⁴ After instituting "an inquiry into the nature, rights, and duties of aggregate corporations at common law," he found it to be "one of the most stubborn and well settled doctrines of the common law" that unless a power is reserved for the purpose the charter of a private corporation cannot be altered or amended without its consent (referring to *Rex v. Passmore*, 3 T. R. 199, and cases there cited). Applying principles derived from Blackstone, Kyd *On Corporations*, Lord Hardwicke, and others, he held that Dartmouth College was a private corporation. Under common law principles, the visitatorial power, in the absence of specific reservation, devolved upon the trustees and was subject to no supervision or control save by judicial proceedings in the event of fraudulent misapplication of the charter (frequently citing Lord Holt in *Phillips v. Bury*, 1 Ld. Ray. 5 S. C., 2 T. R. 346). He found the charter to be a contract, regardless of the question of consideration (citing Blackstone that "a gift, completely executed, is irrevocable"), but went on to say that even if consideration were necessary it was present in the instant case. To the objection that the contract clause was not meant to apply to this type of situation, he replied that "it would be far too narrow a construction of the Constitution" to limit the prohibition to private executory contracts. "The truth is," he asserted, "that the government has no power to revoke a grant, even of its own funds, when given to a private person, or a corporation, for special uses." The only authority remaining is judicial, to enforce the proper use of the grant and suppress frauds. Thus the charter was a contract within the purview of the constitutional prohibition, and a very summary examination of the acts in question shows that they changed the charter "in many material respects." If the legislature means to claim such an authority, it must be reserved in the grant. The charter of Dartmouth College contained no such reservation, with the result that the acts of the New Hampshire legislature were necessarily unconstitutional and void (4 Wheat. 666-713).

There is a very extensive literature on this case. One of the longest and most critical is that of J. M. Shirley, *The Dartmouth College Causes and the Supreme Court* (1879). The account of Beveridge (*Life of Marshall*, IV, ch. V) is an excellent narrative. Corwin's discussion (*John Marshall and the Constitution*, pp. 154-72) is brief but incisive. Among the articles on the case the following are among the most useful: Charles Doe, "A New View of the Dartmouth College Case," 27 *American Law Rev.*, 71 (1893); 6 *Harvard Law Rev.*, 161, 213 (1892); C. H. Hill, "The Dartmouth College Case," 8 *American Law Rev.*, 189 (1874); William Trickett, "The Dartmouth College Case Paralogism," 40 *American Law Rev.*, 175 (1906); H. H. Hagan, "The Dartmouth College Case," 19 *Georgetown Law Journal*, 411 (1931); R. M. Denham, Jr., "An Historical Development of the Contract Theory in the Dartmouth College Case," 7 *Michigan Law Rev.*, 201 (1909); H. E. Willis, "The Dartmouth College Case, Then and Now," 19 *St. Louis Law Rev.*, 183 (1934).

haps the most far-fetched, if, as it turned out, the least important, extension of the contract clause was made in *Green v. Biddle*.⁶⁵ In that case the Court held that an agreement between Kentucky and Virginia could not be violated by the former without impairing the obligation of contract. This application of the clause would be no more unreasonable than those previously discussed were it not that the second sentence following the contract clause in the Constitution provides that "no State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State. . . ." ⁶⁶ The clause is both a prohibition and a grant of power. The compact between Virginia and Kentucky in 1789 involved in *Green v. Biddle* was the first to be made under it, and it, like the many subsequent interstate compacts, was authorized by act of Congress.⁶⁷ Justice Story, who gave the first opinion in the case, must have been aware of this congressional act and its constitutional significance, but he makes no direct mention of it. In Justice Washington's opinion, following a re-hearing, the act is referred to.⁶⁸ However, the Court seemed to find the enforcement of a compact, or a contract ("the terms compact and contract are synonymous" ⁶⁹), a more satisfactory position than the enforcement of an act of Congress. In another case decided in 1831 involving this compact no mention is made of the relevant congressional statute.⁷⁰ However, as will be pointed out in the next chapter, it was only a few years before the Court came to realize that interstate compacts could more properly be dealt with under the constitutional clause applying to them, and to them only.

The Bankruptcy Cases. The first case under the contract clause of the Marshall period in which a contract between pri-

⁶⁵ 8 Wheat. 1 (1823).

⁶⁶ Article I, Section 10.

⁶⁷ 1 *Statutes at Large*, 189. This was the act admitting Kentucky into the Union.

⁶⁸ 8 Wheat. 1, 85 *et seq.*

⁶⁹ *Ibid.*, p. 92.

⁷⁰ *Hawkins v. Barney's Lessee*, 5 Pet. 457 (1831).

vate individuals was involved is *Sturges v. Crowninshield* ⁷¹ in 1819. Here was involved the validity of a New York bankruptcy act as it applied to a contract of debt made before the law was passed. The Constitution gives to Congress the power to enact "uniform laws on the subject of bankruptcies throughout the United States." ⁷² Marshall gave to this the reasonable interpretation that, although Congress might enact one or more such statutes which would by their nature exclude state legislation on the subject, until it did so the states were free to regulate "such cases as the laws of the Union may not reach." ⁷³ Congress at that time had not exercised its power so as to cover the field, ⁷⁴ and the states were free to legislate on the subject so long as their bankruptcy statutes were not in violation of the contract clause. In considering this issue Marshall discusses at greater length than he had been accustomed to do the purpose of that clause. He notes that counsel have pointed out that the states had long held to the practice of enacting laws for the relief of insolvent debtors and that if the convention had intended to proscribe such laws it would have mentioned them. The contract clause, counsel contended, was included to prevent laws allowing debtors to pay in depreciated currency or other less valuable property, or to postpone the time of payment, or to pay in installments. ⁷⁵ Marshall finds this argument unconvincing. The Framers intended not to forbid a specific kind of law but to establish a principle, a principle that contracts must not be interfered with by legislative activity. ⁷⁶ There seems to be no conclusive evidence to indicate that the Framers were opposed to bankruptcy legislation, or ever contemplated its inclusion under the prohibition of the contract clause, ⁷⁷ and the validity of the decision rests solely upon the argument that the wording of

⁷¹ 4 Wheat. 122 (1819).

⁷² Article I, Section 8, cl. 4.

⁷³ 4 Wheat. 122, 195 (1819).

⁷⁴ *Infra*, p. 102.

⁷⁵ 4 Wheat. 122, 198-99, 202.

⁷⁶ *Ibid.*, p. 204.

⁷⁷ Farrand, *Records*, II, 447; *Federalist*, no. 42; Hamilton, *Opinion as to the Constitutionality of the Bank of the United States* (1791).

the clause is general in nature and must be held to apply to all interferences with contractual obligations.⁷⁸ Even Marshall, however, allows an exception. Bankruptcy laws which do no more than discharge the person of the debtor, i.e., abolish imprisonment for debt, and leave the obligation to pay in force, were not intended to be prohibited.⁷⁹ Of course, the general prohibition to which Marshall so often calls attention makes no such limitation, but doubtless the Framers would not have objected to Marshall's liberality here.

In the *Sturges* case the New York bankruptcy act was held invalid as it applied to a contract made before the passage of the law. Marshall's opinion, however, contained a general condemnation of such statutes which would seem to apply to cases where the law was in existence at the time of entering into the contract. And in a case decided immediately afterward, the Chief Justice, in an opinion of three sentences, merely said that "the circumstances of the state law, under which the debt was attempted to be discharged, having been passed before the debt was contracted, made no difference in the application of the prin-

⁷⁸ "It seems scarcely possible to suppose that the framers of the constitution, if intending to prohibit only laws authorizing the payment of debts by installment, would have expressed that intention by saying 'no state shall pass any law impairing the obligation of contracts.' No men would so express such an intention. No men would use terms embracing a whole class of laws, for the purpose of designating a single individual of that class. No court can be justified in restricting such comprehensive words to a particular mischief to which no allusion is made.

"The fair, and, we think, the necessary construction of the sentence, requires that we should give these words their full and obvious meaning. A general dissatisfaction with that lax system of legislation which followed the war of our revolution undoubtedly directed the mind of the convention to this subject. It is probable that laws such as those which have been stated in argument, produced the loudest complaints, were most immediately felt. The attention of the convention, therefore, was particularly directed to paper money, and to acts which enabled the debtor to discharge his debt otherwise than was stipulated in the contract. Had nothing more been intended, nothing more would have been expressed. But, in the opinion of the convention, much more remained to be done. The same mischief might be effected by other means. To restore public confidence completely, it was necessary not only to prohibit the use of particular means by which it might be effected, but to prohibit the use of any means by which the same mischief might be produced" (4 Wheat. 122, 205-06).

⁷⁹ *Ibid.*, p. 203.

ciple.”⁸⁰ However, in that case a discharge was sought under the law of a state different from that in which the contract was made, and the decision was subsequently limited to apply to that situation. Not until the extremely important case of *Ogden v. Saunders*⁸¹ in 1827 did the Court rule squarely upon the validity of a bankruptcy law enacted before the contract was made. It sustained the law, but only over the emphatic dissent of the Chief Justice, a dissent concurred in by Justices Duvall and Story. This is the only constitutional decision during his thirty-four years as Chief Justice in which Marshall was one of the minority. If his point of view here had been that of the majority, the decision, unless later reversed, would have been as great a limitation upon state legislative power as any of his period, perhaps the most sweeping. Indeed it might have given to the Court a power of supervision over legislation under the contract clause comparable with that developed late in the century under the due process clause.

The four members of the majority, Washington, Johnson, Thompson, and Trimble, wrote separate opinions, although there is little disagreement among them. They agree in saying that the *Sturges* decision must be confined to the case of contracts previously made, and that *McMillan v. McNeill*, in spite of the sweeping statement attributed to Marshall by the reporter, applies only to discharge under the laws of a state different from that in which the contract was formed.⁸² With this the Chief Justice agreed.⁸³ The general position taken by the majority, one with which Marshall completely disagreed, is that a statute in effect at the time a contract is formed is “the law of the contract,” “a part of the contract,”⁸⁴ and therefore cannot be held to impair its obligation. By classing together bills of attainder, *ex post facto* laws, and laws impairing the obligation

⁸⁰ *McMillan v. McNeill*, 4 Wheat. 209, 212-13 (1819).

⁸¹ 12 Wheat. 213 (1827).

⁸² *Ibid.*, pp. 254, 271, 272, 293, 314-15.

⁸³ *Ibid.*, p. 333.

⁸⁴ Washington, J., *ibid.*, at 259. See also Thompson, J., at 299, and Trimble, J., at 327.

of contracts the intent of the Constitution "becomes very apparent." It is, said Justice Johnson, "a general provision against arbitrary and tyrannical legislation over existing rights, whether of person or property."⁸⁵ The community is as much entitled to set bounds to "the will of the contracting parties" in regard to insolvency as "in the instances of gaming debts, usurious contracts, marriage, brokerage bonds, and various others."⁸⁶ Justice Trimble expressed the fears of the majority at the prospect of holding laws like the present one invalid when he said: "The construction . . . would, as I think, transform a special limitation upon the general powers of the States into a general restriction."⁸⁷

This was precisely what Marshall desired, although he denied that such an interpretation did violence to the intentions of the Framers. To the contrary, he insists that "the general language of the clause is such as might be suggested by a general intent to prohibit state legislation on the subject to which the language is applied."⁸⁸ The construction of the majority would "convert an inhibition to pass laws impairing the obligation of contracts, into an inhibition to pass retrospective laws."⁸⁹ The Framers of the Constitution did not intend to have the clause so limited. If they had, they would have used appropriate words. "Those laws which had effected all that mischief the Constitution intended to prevent, were prospective as well as retrospective in their operation."⁹⁰

Perhaps because he is aware of the weakness of his argument from the intentions of the Framers, he asserts the existence of the obligation of contract independent of the work of the state.⁹¹ This is inconsistent with his view in *Sturges v. Crowninshield*,

⁸⁵ *Ibid.*, at 286. He goes on to express it as his opinion that the *ex post facto* clause was erroneously limited to criminal legislation. It should be applied to civil legislation as well.

⁸⁶ *Ibid.*, p. 289.

⁸⁷ *Ibid.*, p. 322.

⁸⁸ *Ibid.*, p. 356.

⁸⁹ *Ibid.*, pp. 355-56.

⁹⁰ *Ibid.*, p. 357.

⁹¹ *Ibid.*, pp. 344, 355-56.

where he said, "A contract is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertaking and this is, of course, the obligation of his contract."⁹² Marshall wished to give the broadest possible protection to contracts under the constitutional clause, and, if that clause be limited, he was prepared to rest his case upon appeal to the immutable laws of nature. In a state of nature, he asserts, man had the right to acquire property and to enjoy its fruit. "Individuals do not derive from government their right to contract, but bring that right with them into society." Similarly the obligation is intrinsic, not conventional. As the rights of property are natural, so are they inalienable. Consequently no just government may interfere with them excepting as it substitutes legal remedies for personal force and as it regulates or prohibits mischievous agreements.⁹³ Had this case come to the Court a few years earlier he might have had his way and made the obligation of contract as inclusive as the later interpretation of liberty of contract under the due process clause. But by 1827 a majority of the Court was unwilling to go so far, and the first great restriction upon the scope of the clause was set forth over the stout opposition of the Chief Justice.

The Later Contract Cases of the Marshall Period. *Ogden v. Saunders*⁹⁴ proved to be a turning point in contract clause decisions in another sense. Up to the time of this case there had been only one decision⁹⁵ under the contract clause in which the

⁹² 4 Wheat. 122, 197 (1819).

⁹³ 12 Wheat. 346-47.

⁹⁴ After the Court had decided that a bankruptcy law was valid as to contracts made after the passage of the law, so far as concerns citizens of the state under whose law the discharge was obtained, the question of its applicability to a contract made with a citizen of another state, and where the certificate was pleaded in the courts of another state or in the federal courts, was argued. After this argument a new majority, consisting of the old minority plus Johnson, held that the law could not be constitutionally applied. 12 Wheat. 358.

⁹⁵ *Goszler v. Georgetown*, 6 Wheat. 593 (1821). I am omitting from this generalization the case of *Owings v. Speed*, 5 Wheat. 420 (1820), because there the state law complained of was enacted in 1788, and since the Constitution did not go into effect until 1789, the Court could not consider the statute under the contract clause.

act complained of was sustained. After that decision there were nine contract cases, but in none was a statute held to be unconstitutional.⁹⁶ The expansion of the contract clause under Marshall ended with the failure of his attempt to give to its words a prospective as well as a retrospective meaning. The cases subsequently decided involved, with but one exception, the application of principles set forth in the remarkable series of opinions written between 1810 and 1827. The exception was a case of future importance, for in it Marshall began the process of limiting one of his own most important doctrines. *Providence Bank v. Billings*⁹⁷ involved the power of a state to tax a bank which it had chartered. As has been pointed out above, Marshall held in this case that the relinquishment of the power of taxation should never be implied, and that the grant of a charter serves only to give individuality to a group so that any burdens to which individuals are subject are not removed except by express grant.

Opposition to the Court's Interpretation of the Contract Clause. Almost every one of Marshall's opinions dealing with the obligation of contracts met with strong, if not abusive, opposition. But this opposition is far more indicative of an attachment to state "sovereignty" than to a far-sighted understanding of the economic significance of the Marshallian principles. It is true that most of the unpopular decisions of this period were cases disposed of under the contract clause, but merely because that was the provision of the Constitution under which state action was most frequently held invalid. Because of its numerical importance in later decades we are apt to forget that in Marshall's thirty-four years there were only two

⁹⁶ The other contract cases of the Marshall period were: *Satterlee v. Matthewson*, 2 Pet. 380 (1829); *Jackson v. Lamphire*, 3 Pet. 280 (1830); *Providence Bank v. Billings*, 4 Pet. 514 (1830); *Hawkins v. Barney's Lessee*, 5 Pet. 457 (1831); *Lessee of Livingston v. Moore*, 7 Pet. 469 (1833); *Watson v. Mercer*, 8 Pet. 88 (1834); *Mumma v. Potomac Co.*, 8 Pet. 281 (1834); *Mason v. Haile*, 12 Wheat. 370 (1827); *Beers v. Haughton*, 9 Pet. 329 (1835). All excepting one or two of these which involve minor points of jurisdiction are considered in Part II.

⁹⁷ 4 Pet. 514 (1830). *Supra*, p. 37.

cases in which state statutes were held contrary to the commerce clause. Cases like *Cohens v. Virginia*⁹⁸ and *McCulloch v. Maryland*⁹⁹ are found grouped with *Green v. Biddle* and *Sturges v. Crowninshield* in speeches denouncing the Court. The fact seems to be that opposition to the Court, at least in Marshall's time, was aroused by any decision tending to derogate from the independence of the states, and that opposition to the contract clause decisions was merely one aspect of this, although probably the most important one. And it is significant of the spirit behind the opposition to the Court's rulings that *New Jersey v. Wilson* and the Dartmouth College decision, both cases of the greatest economic significance, aroused less interest and resulted in less criticism than any of the other major cases of the period.

There was already a good deal of opposition to the Supreme Court when *Fletcher v. Peck* was decided. The decision in this case was "highly unwelcome to the people"¹⁰⁰ and "fell with a stunning shock upon the State-Rights politicians and enhanced their hostility towards the judicial power."¹⁰¹ It was received with violent opposition from the Representatives of Georgia in Congress. A furious fight raged for four years over measures designed to compromise with the Yazoo claimants. In the course of these debates the Court was frequently bitterly attacked, and often on the basis of its contract decisions in particular. Randolph denounced the decision in the House¹⁰² and George M. Troup of Georgia called it a pronouncement "which the mind of every man attached to Republican principles must revolt at."¹⁰³

On January 20, 1813, a bill was before the House to pay the Yazoo claimants. Troup instantly took the floor and delivered, as Beveridge calls it, "such an excoriation of the Supreme Court

⁹⁸ 6 Wheat. 264 (1821).

⁹⁹ 4 Wheat. 316 (1819).

¹⁰⁰ Beveridge, *Life of Marshall*, III, 595.

¹⁰¹ Warren, *The Supreme Court in United States History*, I, 397.

¹⁰² *Annals*, 11th Cong., 2d Sess., 1881.

¹⁰³ *Ibid.*, p. 1882.

as never before was or has since been heard in Congress.”¹⁰⁴ Referring to *Fletcher v. Peck*, Troup said:

Two of the speculators combined and made up a fictitious case, a feigned issue for the decision of the Supreme Court. They presented precisely those points for the decision of the Court which they wished the Court to decide, and the Court did actually decide them as the speculators themselves would have decided them if they had been in the place of the Supreme Court. . . .

It is this decision of the Judges which has been made the basis of the bill on your table—a decision shocking to every free government, sapping the foundations of all your constitutions, and annihilating at a breath the best hope of man.

That the representatives of the people may corruptly barter away their rights is a monstrous and abhorrent doctrine which must startle every man in the nation, that you ought promptly to discountenance and condemn.

Why . . . do the judges who passed this decision live and live unpunished? . . . The foundations of the Republic are shaken and the judges sleep tranquilly at home.¹⁰⁵

Although the other states “did not entertain the same resentment at the Court’s decision in *Fletcher v. Peck* which was felt in Georgia,”¹⁰⁶ still it is interesting to notice that Beveridge believes Troup “expressed the sentiments of the vast majority of the inhabitants of the United States.”¹⁰⁷

Nine years later, in 1819, the important Dartmouth College case was decided, but slight notice seems to have been taken of it at the time. At the time of its decision “its importance was not at all realized.”¹⁰⁸ The Federalist papers in Boston praised it, and the Republican papers almost completely ignored it. In New Hampshire the press divided on political lines, with the Republican papers opposing the decision. But in the South and West practically no attention was paid to it.¹⁰⁹

¹⁰⁴ *Life of Marshall*, III, 597.

¹⁰⁵ *Annals*, 12th Cong., 2d Sess., 856–59; see also *Annals*, 11th Cong., 3d Sess., 414 *et seq.*; 12th Cong., 2d Sess., 856, 1069; 13th Cong., 2d Sess., 1858 *et seq.*

¹⁰⁶ Warren, *The Supreme Court*, I, 399.

¹⁰⁷ *Life of Marshall*, III, 599.

¹⁰⁸ Warren, I, 487.

¹⁰⁹ *Ibid.*, I, 489–90.

Lack of interest in the Dartmouth College case may be in part due to the fact that but two weeks later came the decision in *Sturges v. Crowninshield*, which aroused much more interest. Due to indefinite phraseology of the opinion, a general misunderstanding spread throughout the country that a state had no power to pass any form of bankrupt or insolvent law. The decision thus construed "took the States and the profession by surprise"¹¹⁰ and gave "much alarm to many persons."¹¹¹ Uncertainty and uneasiness were expressed by many contemporary newspapers.¹¹² The decision "aroused great excitement" and "alarmed those who had been using State insolvent laws to avoid payment of their debts, while retaining much of their wealth. It also was unwelcome to the great body of honest, though imprudent, debtors who were struggling to lighten their burdens by legislation."¹¹³ Referring to this decision, Beveridge says, "in his opinion in that case, Marshall used language that also applied to contracts made after the enactment of insolvency statutes; and the bench and bar generally had accepted his statement as the settled opinion of the Supreme Court. But so acute had public discontent become over this rigid doctrine, so strident the demand for bankrupt laws relieving insolvents, at least from contracts made after such statutes were enacted, that the majority of the Supreme Court yielded" in *Ogden v. Saunders*.¹¹⁴

During the litigation in *Green v. Biddle*, Senator Johnson of Kentucky led a bitter attack on the Court. He denounced the invalidating of state laws, most of them under the contract clause. He used the decision in this case as his strongest weapon — "an instance of judicial interference with state laws which, indeed, at first glance appeared to have been arbitrary, autocratic, and unjust," as Beveridge describes the decision.¹¹⁵

¹¹⁰ Warren, I, 494.

¹¹¹ *Niles Register*, February 27, 1819.

¹¹² Warren, I, 494 *et seq.*

¹¹³ Beveridge, *Life of Marshall*, IV, 218.

¹¹⁴ *Ibid.*, IV, 480.

¹¹⁵ IV, 374-75.

Senator Johnson examined the historical reasons for including the contract clause in the Constitution, "in order to understand perfectly well the mystical influence" of the provision.¹¹⁶ He finds it never was intended to affect such legislation as the Kentucky land system. It does not justify the federal courts in annulling measures of public policy "which the people have solemnly declared to be expedient."¹¹⁷ The decision in *Green v. Biddle* prostrates the deliberate course which Kentucky has pursued for almost a quarter of a century, "and affects its whole landed interest. The effect is to legislate for the people; to regulate the interior policy of that community, and to establish their municipal code as to real estate."¹¹⁸

This is despotism. "I see no difference, whether you take this power from the people and give it to your judges, who are in office for life, or grant it to a King for life."¹¹⁹ The time is over-ripe to check this judicial usurpation. Laws of eight states have already been struck down by the national judiciary.¹²⁰

He proposed limitation of jurisdiction, removal by joint address of both houses of the legislature, limited term of office, or the possibility of appeal from judicial decisions to some body "who shall be responsible to the elective franchise."¹²¹ A year later Johnson proposed that the Supreme Court be increased to ten, with concurrence of seven justices necessary to invalidate a state or national law.¹²²

After the re-argument in *Green v. Biddle*, the Kentucky laws were again declared unconstitutional, this time by Justice Washington. Justice Story in the first decision on this case had not

¹¹⁶ *Annals*, 17th Cong., 1st Sess., 96-8. For his criticism of *New Jersey v. Wilson*, see the same, p. 88.

¹¹⁷ *Ibid.*, p. 103.

¹¹⁸ *Ibid.*, p. 104.

¹¹⁹ *Ibid.*, p. 108.

¹²⁰ *Georgia, Fletcher v. Peck; Pennsylvania, United States v. Peters; New Jersey, New Jersey v. Wilson; New Hampshire, Dartmouth College v. Woodward; New York, Sturges v. Crowninshield; Maryland, McCulloch v. Maryland; Virginia, Cohens v. Virginia; Kentucky, Green v. Biddle.* It is interesting to note that five of these eight cases were decided under the contract clause.

¹²¹ *Annals*, 17th Cong., 1st Sess., 113.

¹²² *Annals*, 18th Cong., 1st Sess., 28.

specifically used the contract clause as the basis for his judgment, but Washington now placed the opinion squarely upon that provision.

Kentucky promptly answered. Governor John Adair in a message to the legislature declared that the decisions in this litigation struck at "the right of the people to govern themselves."¹²³ Resolutions were passed by heavy majorities hinting at forcible resistance to the mandate of the Court.¹²⁴ However, the resentment gradually subsided.

Referring to *Satterlee v. Matthewson*, argued in 1829 on the basis of the contract clause, Warren says, "It was particularly for its decisions on this clause of the Constitution that Southern and Western Congressmen, and even Van Buren of New York and Holmes of Maine had assailed the Court in the Senate, three years before, and again this year."¹²⁵

Early Reservation Clauses. One of the most surprising features in the history of the contract clause is that the first statutory provisions reserving to the states the right to amend or repeal charters of incorporation precede the first cases interpreting the contract clause. The Dartmouth College ruling that a charter is an inviolable contract, together with Story's suggestion that the states could rescind or alter charters providing they had reserved that right in advance, led, sooner or later, to the widespread adoption of such clauses in statutes or constitutions. But even before 1819, and indeed before 1810, some clauses of the kind are to be found. Chief Justice Parsons of Massachusetts had said in 1806 that rights vested in a corporation could not be taken away unless the legislature had received that power in the act of incorporation.¹²⁶ Just how early such reservation clauses appear in special acts of incorporation

¹²³ *Niles*, XXV, 203-05.

¹²⁴ *Ibid.*, XXV, 261, 275-76; XXXIX, 228-29.

¹²⁵ Warren, *The Supreme Court*, II, 169. See the debate in the Senate, April 7, 10, 11-14, 1826, in the course of which Van Buren condemned the Court's interpretation of the contract clause, "a brief provision which had given to the jurisdiction of the Court a tremendous sweep" (*Annals*, 19th Cong., 1st Sess.).

¹²⁶ *Supra*, p. 20.

is not certain, but they may be found at least as early as 1805 in Virginia.¹²⁷ And the Massachusetts General Manufacturing Law of 1809 provides in Section 7 "that the Legislature may from time to time, upon notice to any corporation, make further provisions, and regulations for the management of the business of the corporation, and for the government thereof, or wholly to repeal any act, or part thereof, establishing any corporation as shall be deemed expedient."¹²⁸ Clauses of general applicability appear to have been exceptional for many years to come, as much because all charters were granted by special act as because the legal principles of the subject had not been made clear. But reservation clauses in special acts of incorporation were adopted in a number of states.¹²⁹

These first clauses, so far as has been discovered, do not depend upon state court decisions denying the right to alter or repeal charters, although Parsons' dictum may have been partly responsible for the Massachusetts statute. Certainly they were not the result of Marshall's interpretation of the contract clause. It would be more accurate to say that his interpretation came from the same attitude which produced the belief that such clauses are necessary; that is, the principle of the sanctity of vested rights. It was Marshall's achievement to incorporate this doctrine into the law of the Constitution, employing for that

¹²⁷ See the Act to Incorporate the Virginia Marine Insurance Company, passed January 31, 1805 (Shepherd's *Statutes at Large of Virginia from 1792-1806*, III, 135).

¹²⁸ *Laws of Massachusetts*, May session, 1806, to January session, 1809, p. 467.

¹²⁹ See the Connecticut acts incorporating the Derby Fishing Company, *Connecticut Acts and Laws*, May session, 1808, p. 815, and the Ocean Insurance Company, *ibid.*, October session, 1818, p. 323. See also p. 336. A general reservation clause was adopted in New York in 1827. See *Revised Statutes of New York* (1829), I, 600 (pt. I, ch. XVIII, tit. III, sec. 8). For the Pennsylvania act of 1836, see Purdon's *Digest of the Laws of Pennsylvania* (6th ed., 1841), p. 187. The earliest reservation clause in a state constitution was apparently that in Delaware in 1831. Article II, Sec. 17, of the constitution of that year provided that "No act of incorporation, except for the renewal of existing corporations, shall be hereafter enacted without the concurrence of two-thirds of each branch of the legislature, and with a reserved power of revocation by the legislature." The widespread adoption of constitutional clauses reserving this power comes after about 1850. See p. 84, below.

purpose the obligation of contract clause. But as Hamilton's opinion of the validity of the Georgia repeal act of 1796,¹³⁰ as well as Marshall's opinion in *Fletcher v. Peck*, clearly shows, this achievement was accomplished by a process of writing the "first principles of natural justice and social policy" into a clause intended to have a limited, relatively specific meaning. The belief of the propertied classes that it was morally wrong to repeal or alter a legislative grant was made a part of the supreme law of the land. This gave to the early reservation clauses a specific constitutional justification which they did not have at the time of their adoption. And as the number of charters of incorporation increased and the implications of the Marshall decisions became clearer, it became the rule rather than the exception to avoid the restrictions imposed by those decisions through the adoption of reservation clauses in general incorporation statutes and constitutional provisions. That process, however, had only begun at the end of Marshall's chief justiceship.

Contract Clauses in State Constitutions. One should not jump to the conclusion that the adoption of reservation clauses by the states is indicative of a pervasive opposition to the judicial interpretation of the contract clause. It has been pointed out that even the most unpopular of contract decisions were attacked more because of local dislike of a national veto power over state legislation than because of fear of the principles therein given expression. That Marshall's interpretation of the contract clause did fit in with the prevailing economic and political thought of the years of democratic development is made evident by the adoption of contract clauses in state constitutions. This process began in 1790 when Article IX, Section 17, of the Pennsylvania constitution prohibited the legislature from passing "any law impairing contracts." The example of that state was followed by Kentucky in 1792 and Tennessee in 1796. Thus before Marshall became Chief Justice three states had clauses similar to, or in the case of Tennessee identical with, that of the national Constitution. These clauses

¹³⁰ *Supra*, p. 21.

were included in the articles devoted to the bill of rights. By the end of Marshall's term nine additional states had adopted clauses of the same kind.¹³¹ Several of these states were formed from the old Northwest Territory, but in no case was the contract clause of the Ordinance of 1787 made the pattern for the clause in the state constitution. Rather was the more inclusive terminology of the national Constitution followed.¹³² And as in the Pennsylvania, Kentucky, and Tennessee constitutions the contract clause was, with one exception, included in the bill of rights. The exception is Virginia, where the Declaration of Rights of 1776 was reenacted in its original form and the contract clause was included in the article dealing with the legislature. The prohibition against impairing the obligation of contracts is obviously viewed as one of those restrictions upon governmental power which serve to protect the most valuable rights of the citizen. The protection of the rights of property was to the constitution makers of nineteenth-century America as important a part of the function of a democracy as the protection of traditional civil rights — freedom of speech and of the press, freedom of religion, a fair trial in open court before a jury, the right to assemble and petition, and the like. The adoption of reservation clauses indicates a widespread desire to retain the power to regulate grants to corporations, but it is not evidence of a desire to curtail the power of the courts in the protection of what were viewed as the legitimate rights of private property.

¹³¹ In the order of adoption the states were Ohio, Indiana, Mississippi, Illinois, Alabama, Maine, Missouri, Virginia, and Michigan.

¹³² The first constitutions of Indiana and Illinois had "validity" in place of "obligation," but the latter term was substituted in their second constitutions. Perhaps the greatest variation from the national model in the period is the clause in the Missouri constitution: "That no *ex post facto* law, nor law impairing the obligation of contracts, or retrospective in its application can be passed" (Art. XIII, Sec. 17).

CHAPTER III

TANEY AND THE CONTINUANCE OF THE MARSHALL TRADITION

The Character of the Taney Period. It is one of the generally accepted dogmas of American constitutional history that Chief Justice Taney and his Court were concerned with the protection of the public interest rather than the rights of private property. "Jacksonian judges from agrarian states broke down the historic safeguards thrown around property rights by the letter of the Constitution and the jurisprudence of John Marshall."¹ The judges appointed between 1829 and 1861 were, with the exception of Curtis, a Whig, all Democrats. Some of them came from agrarian states. Doubtless one would *a priori* expect to find the Democratic appointees to the Court little disposed to carry on the extreme Federalism of Marshall so far as the protection of vested interests is concerned. These were years of many humanitarian reforms, and the continued democratization of state constitutions. But the decisions of the Court do not bear out the theory that the Democratic judges of these years broke down the previously erected safeguards to property rights. Leaving out of account the slavery cases, where there is neither the possibility of comparing the Marshall and the Taney Courts, nor the likelihood that the latter will be accused of failure to give protection to property rights, most of the decisions involving the rights of private property came under the contract clause. And the simple fact is that the contract clause was a more secure and a broader base for the defence of property rights in 1864 than it had been in 1835.

It is true that there had been two or three decisions imposing restrictions upon the application of the clause, but only one of

¹ Charles A. and Mary Beard, *The Rise of American Civilization* (1927), I, 689. See also the similar characterization of Taney's work as Chief Justice by Louis B. Boudin in *Encyclopaedia of the Social Sciences*, XIV, 509.

these, the doctrine of strict construction in the Charles River Bridge case, represents anything approaching a major break with the Marshall tradition.² It, curiously enough, was probably suggested to Taney by opinions of the Marshall period. Furthermore its influence was not felt until after Taney's death. The other limitations are of very minor importance, and against them are to be set off several extensions. But the Taney period is not properly classified either as an era of contraction or one of expansion of the contract clause. Rather is it one of consolidation and application. With very few exceptions, the contract clause principles of Marshall were those of Taney, and during his chief justiceship the clause was applied much more frequently and to a wider variety of subject matter. The proportion of cases involving this clause in which statutes were held unconstitutional is almost exactly the same in the two periods. Where there had been but eight such cases in Marshall's thirty-four years there were eighteen in Taney's twenty-eight. It is granted that such statistics may mean very little, but an examination of the decisions will afford ample evidence that they are not misleading. In taking up the cases of the Taney period those which represent some contraction of the Marshall doctrine will be first considered.

Strict Construction of Public Grants. Of the cases which may be said to reflect Taney's desire to uphold the power of the state rather than the property rights of individuals the Charles River Bridge case is the most important.³ Because the decision came in Taney's first term many people have assumed that the opinion can be taken as a complete and accurate indication of his attitude. This decision is, however, far from being the whole story, and, although it does represent a modification of

² Frequently this case, sometimes a single sentence from Taney's opinion in it, is cited as adequate evidence that the Taney Court reversed the Marshall Court's interpretation of the contract clause. The sentence usually quoted is, "While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well being of every citizen depends on their faithful preservation." 11 Pet. 420, 548 (1837).

³ Charles River Bridge v. Warren Bridge, 11 Pet. 420 (1837).

the more extreme Marshall point of view, it does not represent a break with the tradition of the Marshall Court.

The Charles River Bridge was privately owned and operated as a toll bridge for profit. Incorporated in 1785, its franchise had been extended in 1792, and had a number of years to run when, in 1828, Massachusetts incorporated the Warren Bridge Company. The latter was authorized to build and operate a toll bridge within a few rods of the Charles River Bridge, and it was provided that after a short period of time the Warren Bridge should become a free bridge and a part of the public highway. There was nothing in the charter of the Charles River Bridge Company to the effect that its grant was exclusive. But it was apparent that a toll bridge so close to a free bridge could not possibly be successful. The Supreme Judicial Court of Massachusetts having rejected the pleas of the first company that its charter right was infringed, appeal was taken to the Supreme Court. Counsel for the plaintiff relied principally upon the contract clause, as that clause had been interpreted during the Marshall period. But Taney, speaking for the Court, held that the state had not given the Charles River Bridge Company an exclusive charter. There was no contract to the effect that another bridge, free or toll, would not be established near by. Public grants or franchises are to be strictly construed. Nothing passes by implication.⁴ In support of this principle Taney cites the partially relevant English rule for the construction of statutes as recently set forth in *Stourbridge Canal v. Wheely*,⁵ the entirely relevant statement of Marshall in the Providence Bank case,⁶ as well as the expositions of the rule for the construction of public grants in *Beaty v. Lessee of Knowler*⁷ and *United States v. Arredondo*.⁸ So far as the statement of principle is concerned Taney does little more than repeat the Beaty opinion: "a corporation is strictly limited to the exercise of those powers

⁴ 11 Pet. 420, 544 *et seq.* (1837).

⁵ 2 Barn. & Adol. 793.

⁶ *Supra*, p. 38.

⁷ 4 Pet. 152 (1830).

⁸ 6 Pet. 691, 738 (1832). See also *Jackson v. Lamphire*, 3 Pet. 280, 289 (1830).

which are specifically conferred on it. . . . The exercise of the corporate franchise, being restrictive of individual rights, cannot be extended beyond the letter and spirit of the Act of Incorporation.”⁹ It is probable that Marshall, although he had concurred in Justice McLean’s opinion in that case, as well as Justice Baldwin’s opinion in the Arredondo case,¹⁰ would have disagreed with Taney’s application of the principle in the Charles River Bridge situation.¹¹ But neither that difference of application nor the publicity attaching to the Taney opinion can be taken as evidence of a genuine break with the traditions of the Marshall Court.

There were relatively few cases in the Taney period in which the principle of the Charles River Bridge case was applied. In these decisions there is clear evidence that the rule for the construction of public grants set forth in 1830, 1832, and 1837 was to be given effect. There is no indication of an animosity toward the rights of private property. Rather was the Taney Court desirous of so construing the grants to public utilities as not to stifle the development of new methods and new channels of commerce. This was as much in the interests of private investors as of the public welfare. And it was situations of this kind that Taney had in mind when he spoke of an interpretation which would shackle new means of transportation in order to give protection to the old canals and turnpikes.¹²

Of the four cases, those involving tax exemptions excluded,

⁹ 4 Pet. 152, 168 (1830). Taney refers to these cases in his opinion, 11 Pet. 420 at 546.

¹⁰ “Public grants convey nothing by implication; they are construed strictly in favor of the king.” 6 Pet. 691, 738 (1832).

¹¹ In the Providence Bank case Marshall had said that a power “which may in effect destroy the charter, is inconsistent with it; and is impliedly renounced by granting it. Such a power cannot be exercised without impairing the obligation of the contract.” 4 Pet. 514, 560-61 (1830). Justice Story, dissenting in the Charles River Bridge case, argued that a grant of this kind carries the necessary implication that the legislature will do nothing to destroy or essentially impair the franchise. An act taking away the opportunity for collecting tolls does impair the right of the company and violates the contract clause. 11 Pet. 420, 583-650. Justice Thompson concurred in this dissent. Justice McLean argued that the case should be dismissed for want of jurisdiction.

¹² 11 Pet. 420, 551-53.

in which the rule of strict construction is most clearly applied between 1837 and 1864 two had to do with ferries. In the first the Court ruled that an Illinois act of 1819 did not give an exclusive franchise.¹³ In the second¹⁴ an act of the Iowa Territorial legislature granting the right to conduct a ferry across the Mississippi and stipulating that no county court should authorize the establishment of another ferry was held not to be an exclusive franchise. The early act forbids the county officials from authorizing new ferries, but did not attempt to limit the future exercise of this power by the state. A third case¹⁵ involved the construction of a railroad franchise. Here the grant was an exclusive one so far as concerns the right to carry passengers between Richmond and Fredericksburg. This was held not to prevent another road from being granted the right to carry freight between the two cities, nor to prevent another road from crossing and running parallel to the first road's tracks for part of the distance. A case¹⁶ decided in Taney's last term presents a situation similar to that envisaged by Taney in his Charles River Bridge opinion. New Jersey authorized the construction of a railroad viaduct or bridge inside the area which, by a ninety-nine-year franchise to a toll bridge company, was to be free of other bridges. The Court sustained the new grant on the grounds that the viaduct could not carry the kind of traffic using a toll bridge, and therefore the rights of the proprietors of that structure were not infringed by the subsequent grant any more than they would be by the grant of a ferry franchise within the area.

Eminent Domain. Aside from the principle of strict construction the main limitation upon the contract clause in the Taney period is the doctrine of the inalienability of the right of eminent domain. This question seems not to have been discussed in any of the cases arising during the reign of Chief Justice Marshall.

¹³ *Mills v. County of St. Clair*, 8 How. 569 (1850).

¹⁴ *Fanning v. Gregoire*, 16 How. 524 (1853).

¹⁵ *Richmond, Fredericksburg and Potomac R. R. Co. v. Louisa R. R. Co.*, 13 How. 71 (1851).

¹⁶ *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116 (1864).

It has, however, been recognized since the first term of the Court under Chief Justice Taney, even though a case directly involving the issue did not come before the Court for over ten years. In their arguments in the Charles River Bridge case Dutton for the original grantee, and Davis for the later grantee, concede that property held under a grant from the state may be taken by authority of the state, if it provide compensation for the taking.¹⁷ There is some confusion in the discussion because of the use of "eminent domain" in several senses. Webster attempts to clarify its meaning and to limit it to the taking of property for public use with compensation, but he then goes on to make the very curious statement, "Nor is it true that the Legislature may not part with a portion of its right of eminent domain. Thus in Wilson's case, the right to tax lands in the state of New Jersey was surrendered by the Legislature."¹⁸

Chief Justice Taney appears quite correctly to believe that the question of eminent domain is irrelevant to the decision of the case and makes only the slightest of references to it.¹⁹ In the dissenting opinions of Justice McLean and Justice Story there is no discussion of the point, but both concede the power of the state to take property for public use, if compensation is made.²⁰

The issue was squarely before the Court for the first time in *West River Bridge Company v. Dix*.²¹ The state of Vermont had granted the privilege of maintaining a toll bridge over the West River to a company for one hundred years. Long before

¹⁷ 11 Peters 420, 455, 466, 505 (1837). Indeed Greenleaf declared that the power of eminent domain could not be bargained away by any legislative enactment. See *Beekman v. Saratoga & Schenectady R.R.*, 3 Paige (N. Y.) 45 (1831) for an early state opinion sustaining this principle.

¹⁸ 11 Peters, p. 535. He is referring to *New Jersey v. Wilson*, 7 Cranch 164 (1815), a case having to do with the power of taxation. Another cloudy statement of the alienability of eminent domain is found near the beginning of this argument (*ibid.*, p. 515).

¹⁹ 11 Peters 542. This is in connection with the original grant of the bridge charter after the taking of the ferry franchise "by virtue of its [the state's] sovereign powers and eminent domain."

²⁰ *Ibid.*, pp. 567, 638, 641 *et seq.*

²¹ 6 How. 507 (1848).

this period had expired the legislature, desiring to construct a through public highway, provided for the taking of the bridge on payment of compensation. Webster, for the bridge company, contended that the contract clause limits even the power of eminent domain,²² but only Justice Wayne agreed with that point of view, and he wrote no dissenting opinion. The Court held that the power of eminent domain does not interfere with the inviolability of contracts, for all contracts are made subject to that power. A franchise stands in no better position than any other property.²³

Private Contracts. Debtors' Relief Legislation. It has been pointed out that not one of the contract cases of the Marshall period involves the kind of legislation which the contract clause was presumably intended to prohibit. Virtually all of the statutes of this kind — stay laws, laws permitting payment of debts in some kind of property other than money, or the issuance of uncovered paper currency — stopped, at least temporarily, with the adoption of the Constitution in 1789.²⁴ Although acts of similar nature began to reappear as early as 1808,²⁵ it was not until 1843 that a case involving their constitutionality was decided by the Court. During the Taney period there are four cases in which such statutes were held void. Taney, who gave the opinion in the first and most frequently cited of these cases, was undoubtedly carrying on the point of view both of the Framers and of Marshall, even though the former had a none too clear conception of the scope of the contract clause, and the latter never had an opportunity to pass upon a law of the kind. The statutes involved in the Taney period decisions were less

²² "If the provision of the Constitution, which forbids the impairment of contracts, does not extend to the contracts of the State governments, and they are left subject to be destroyed by the eminent domain, then there is an end of public faith" (*ibid.*, p. 517).

²³ Woodbury, J., concurring, not only agreed that property could be so taken, but reiterated his opinion that public contracts do not come under the contract clause (*ibid.*, p. 539).

²⁴ For a historical and comparative survey of legislation of this kind see A. H. Feller, "Moratory Legislation: A Comparative Study," 46 *Harvard Law Rev.*, 1061 (1933).

²⁵ See the list in Feller, Appendix I, at pp. 1081 *et seq.*

open infringements of the sanctity of private contracts than most of those of the years before 1787. These acts do not attempt to abolish the debt, to reduce it, nor to permit payment in depreciated currency or some form of property other than money. They do attempt to postpone or stay the time of execution or of actions for the foreclosure of mortgages, to permit payment in installments, to extend the time of redemption, or in some other way to make the burden of the debtor easier. In a great many instances they affect the remedy rather than the debt itself. Consequently a large proportion of the cases dealing with such statutes involve discussions of the principle stated by Marshall in *Sturges v. Crowninshield*, that the remedy may be modified, so long as the contract is not impaired.

The classic case on the subject, *Bronson v. Kinzie*,²⁶ involved the validity of two Illinois statutes enacted in February 1841. The first gave to mortgagors the privilege of redeeming property sold on foreclosure by repaying the purchase money with interest at ten per cent. By the second act it was provided that no judicial sales should be made unless two-thirds of the appraised value should be bid for the property. Both acts were given a retrospective application. The mortgage under which Bronson sought foreclosure on the property of Kinzie was made before the acts were passed, and provided that if default should be made in the payment of the principal or interest it should be lawful for Bronson to sell the mortgaged premises at auction and to convey the same to the purchaser. Chief Justice Taney for the Court held this attempt on the part of Illinois to change the terms of the contract to be an unconstitutional impairment of contract. He agreed that it is within the power of the state to change the remedy upon such contracts, and to make the changes applicable to past as well as future contracts. The new remedy may be less convenient than the old, and may render the recovery of debts "more tardy and difficult. . . . Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not im-

²⁶ 1 How. 311 (1843).

pair the obligation of contract.”²⁷ If that effect is produced, it matters not whether it is accomplished by acting on the remedy or directly on the contract. When a mortgagor is given an equitable estate for a year, there is such a modification of the contract against the interests of one party as undoubtedly to impair its obligation. The statute attempting to alter the conditions of sale, directly in contradiction to the covenant in the contract, materially interferes with the rights of the mortgagee.²⁸

This opinion does little more than say that the change in the remedy must, in the opinion of the Court, be a reasonable one.²⁹ It is not a case to end all cases on the subject. Rather does it make it necessary for the Court to enter upon a long process of pricking out a line between the reasonable and the unreasonable. Only a survey of the relevant cases can make it possible to determine whether this line-pricking method has been productive of definite and easily applicable principles.

McCracken v. Hayward,³⁰ decided the year after *Bronson v. Kinzie*, involved the second of the statutes before the Court in that case. In holding the act invalid, when given a retrospective application, the Court simply reaffirms the earlier decision. An Indiana statute of 1841 requiring that mortgaged property should not be sold to satisfy the debt unless a bid of one-half of the appraised value be received was declared invalid, when given a retrospective application, in *Lessee of Gantly v. Ewing*.³¹ Again there is no definition of a reasonable change in remedy,

²⁷ 1 How. 311, at 316 (1843).

²⁸ Justice McLean dissented on the ground that the statutes did no more than alter the remedy, and all contracts are entered into with “a supposed knowledge by the parties that the lawmaking power may modify the remedy” (*ibid.*, pp. 322, 330).

²⁹ Cf. the statement in *Green v. Biddle*, 8 Wheat. 1, 17 (1823) that a remedy may not be so altered “as materially to impair the rights and interests of the owner.”

³⁰ 2 How. 608 (1844).

³¹ 3 How. 707 (1845). Justice Catron said that “The new remedy, prescribed by the act of 1841, changed the contract. . . . If the Legislature could make this alteration in the contract, and in the decree enforcing it, so it could declare the property should bring its entire value, or that it should not be sold at all; thereby impairing, or defeating the obligation under the disguise of regulating the remedy” (*ibid.*, p. 717).

but simply a declaration that this new requirement was, under the guise of changing the remedy, an attempt to place new and material restrictions upon the substance of the contract. In *Howard v. Bugbee*³² the Court condemned an Alabama statute of 1842 authorizing a judgment creditor of a mortgagor, at any time within two years after the sale under a mortgage, to redeem the property on paying the purchase price, interest, and charges. Justice Nelson relies entirely upon the cases just discussed and makes no attempt to add to what had been said in them.

The subsequent application of the principles stated in these opinions will be considered in a later chapter. But it may be remarked here that cases of this kind have been few in number, and that the rule in *Bronson v. Kinzie* remained as the settled doctrine of the Court, at least until 1934.³³

Tax Exemption. The stay law cases are only a small minority of those in the Taney period in which the Court ruled adversely to state legislation. There are fourteen cases involving contracts to which states were parties, and in them the influence of Marshall, rather than the intentions of the men of 1787, is apparent. Six³⁴ of these had to do with grants of exemption from taxation. They are, that is to say, the fruit of *New Jersey v. Wilson*.³⁵ The principle enunciated in that case was never repudiated by the Court, although it was more than once sharply criticized by dissenting justices. In an early case of the Taney period, *Armstrong v. Athens County*,³⁶ Justice Catron relied upon a very strict construction of the contract in question to sustain the tax. Indeed, it would seem that the Court would have been more nearly in the spirit of *New Jersey v. Wilson* had it disallowed this tax.³⁷ It should not be concluded from this

³² 24 How. 461 (1861).

³³ *Infra*, p. 109.

³⁴ There are actually nine such cases, but in several instances two or more decisions involved the same statute.

³⁵ 7 Cranch 164 (1812).

³⁶ 16 Pet. 281 (1842).

³⁷ The tax was on lands granted to Ohio University in 1804, which lands were to be tax exempt. The University could rent them and demand a further rent

one case in the Taney period that the Court abandoned the early Marshall doctrine in favor of the broad view of state powers which is perhaps derivable from the Providence Bank case. Only three years later it unanimously held invalid a tax by Maryland on the shares of stock in banks chartered by the state.³⁸ Here it appeared that by an act of 1812 the state had prolonged the charters of the banks and specified that, in return for contributions toward the building of the Cumberland Road, the banks would be subject to no further tax burdens during the continuance of the charters. The Court construed this to exclude all forms of taxation, and not merely those upon the franchise of the bank.³⁹

The argument that the state may not, under the guise of a permanent exemption from taxation, surrender its sovereignty, was for the first time faced squarely in *Piqua Branch of the State Bank v. Knoop*.⁴⁰ In the statute under which the bank was chartered it was provided that the bank should pay the state a certain percentage of its profits, this to be in lieu of all other taxes. A later act provided that the capital stock of banks should be taxed in the same way as other personal property. The state argued that the provision in the earlier act was only a rule prescribing the method of taxation and not a contract. The majority of the Court held, however, that the provision was a contract and its obligation had been impaired by the later act. In refuting the argument against surrender of sovereign power, Justice McLean said that the state is exercising, not bartering away, its sovereign rights when it makes a contract. To deny

which was not to exceed the state tax on land similarly located. In 1826 the University was given power to sell the lands. The later tax was justified by the Court on the ground that prior to 1826 the University received a substitute for a tax which would ordinarily be paid to the state. *New Jersey v. Wilson* was distinguished on the ground that the consideration for the exemption in that instance was not limited to the period during which the Indians held the land. For another example of construction favorable to the grantor see *Philadelphia, etc. R.R. v. Maryland*, 10 How. 376 (1850).

³⁸ *Gordon v. Appeal Tax Court*, 3 How. 133 (1845).

³⁹ This decision was later modified. See *The Delaware Railroad Tax*, 18 Wall. 206 (1874); *Shelby County v. Union & Planters' Bank*, 161 U. S. 149 (1896).

⁴⁰ 16 How. 369 (1853).

to the states the power to make a binding contract regarding taxation would be to deny to the state a power "essential to the discharge of its functions as sovereign." The decision as to what is to be taxed and what exempt is a question of policy and not of power. When a state, in order to induce the founding of banks, provides for one kind of contribution or tax, it is exercising its sovereignty. The Constitution only takes away the sovereign power to annul such a contract. Chief Justice Taney concurred in the result but not in the unconvincing reasoning of the majority. Justices Campbell and Daniel believed that there was no contract of exemption, and Justice Catron disagreed flatly with the Court's defence of the possibility of a permanent exemption.⁴¹

That the Court was still far from unanimous in its views on this subject is illustrated by the diversity of opinion in *Ohio Life Insurance & Trust Co. v. Debolt*.⁴² A bare majority of the Court found that an act of 1851 taxing insurance companies and banks at the same rate as other property was taxed in the state did not impair the obligation of a contract contained in this company's charter which had provided that no higher tax should be imposed on the company than on banks.⁴³ Chief Justice Taney, after finding no impairment here, argues that a legislature may bind a successor by a grant of tax immunity only if the state constitution confers on it this power. He believes that the Ohio constitution does allow such contracts to be made. Justice Catron reiterates his previously stated argument against the validity of tax exemptions. Justice Daniel similarly says that he cannot agree with the "suicidal doctrine" that a legisla-

⁴¹ In his dissenting opinion Justice Catron asserted: "That according to the Constitution of all the States of the Union, and even of the British Parliament, the sovereign political power is not the subject of contract so as to be vested in an unrepealable charter of incorporation, and taken away from, and placed beyond the reach of future legislatures; that the taxing power is a political power of the highest class, and each successive legislature having vested in it, unimpaired, all the political powers previous legislatures had, is authorized to impose taxes on all property in the state that its constitution does not exempt." 16 How. at 404.

⁴² 16 How. 416 (1853).

⁴³ Justices Curtis, Nelson, McLean, and Wayne dissented.

ture may permanently bind its creators, the people, by a grant of tax exemption.

There were to be six more cases involving the taxation of banks by Ohio during the next eight years and in all of them the act under examination was held to be an impairment of the obligation of contract.⁴⁴ In the first of them, *Dodge v. Woolsey*, the general issues for the series are made clear. The act of 1845 under which several Ohio banks were organized provided that the bank should pay 6 per cent of its profits to the state in lieu of all taxes to which the bank or its shareholders would otherwise be subject. The constitution of Ohio was changed in 1851 to provide for uniform taxation of moneys and credits and the taxation of the property of corporations the same as that of individuals. When the legislature in 1852 passed an act taxing the banks otherwise than as provided in the act of 1845 the banks contended that the later act impaired the contract made at the time of incorporation.

In this, as in the other cases which followed, the Court is faced with three questions: (1) Is the later form of taxation in conflict with the original agreement? (2) Did the constitution in existence in 1845 allow the legislature to bargain away the taxing power? (3) If it did, could the people change the constitution so as validly (under the Federal Constitution) to destroy existing exemptions? In each instance the Court found that the subsequent act impaired the original contract. It likewise found that the Ohio constitution in existence in 1845 allowed the legislature to make a contract limiting its taxing power for the future. And finally, it held that no change of a state constitution can validate an act otherwise contrary to the Constitution of the United States. In the three cases decided in 1855 Justices Campbell, Catron, and Daniel dissented on the grounds, first, that there was no contract of exemption, but rather that the rate of taxation was, under the act of 1845, alterable by the

⁴⁴ *Dodge v. Woolsey*, 18 How. 331 (1855); *Mechanics' and Traders' Bank v. Debolt*, 18 How. 380 (1855); *Mechanics' and Traders' Bank v. Thomas*, 18 How. 384 (1855); *Jefferson Branch Bank v. Skelly*, 1 Black. 436 (1861); *Franklin Branch Bank v. Ohio*, 1 Black. 474 (1861); *Wright v. Sill*, 2 Black. 544 (1862).

legislature, second, that even if such a contract existed the people should be able to change it by a change in their constitution. It is to be remarked that Chief Justice Taney was with the majority. In the decisions of 1861 and 1862 the Court unanimously declared the acts in question to be unconstitutional on the authority of the Piqua Branch Bank cases and those subsequently decided.

After these decisions of the Taney period it became impossible to induce the Court to reverse the principle of *New Jersey v. Wilson*. Occasionally a justice has, in a dissenting opinion, expressed the view earlier stated by Justice Catron,⁴⁵ and the Court has sometimes expressed the view that it might not hold that a legislature could alienate the taxing power if it were not bound by precedent, but the precedent has been followed.⁴⁶

State Regulation of Banks. In addition to the tax cases there are a number of cases during the Taney period in which the rights and powers of state chartered banks were under consideration. These decisions do not represent any very significant extension of the principles of the contract clause, but they do indicate that the Taney Court was not uniformly disposed to sustain state banking laws, for in three of these cases the statutes were declared invalid. In the first of these, *Planters' Bank v. Sharp*,⁴⁷ Taney dissented, presumably on the construction of the original grant to the bank.⁴⁸ The majority of the Court found that a Mississippi act of 1840 took from a bank the power of discounting bills of exchange which right it had had

⁴⁵ See, e.g., the opinion of Justice Miller in *Washington University v. Rouse*, 8 Wall. 439, 443 (1869), in which he said, "We do not believe that any legislative body, sitting under a state constitution of the usual character, has a right to sell, to give or to bargain away forever the taxing power of the State." This dissent was concurred in by Chief Justice Chase and Justice Field.

⁴⁶ In *The Delaware Railroad Tax*, 18 Wall. 206, 226 (1874), Justice Field said, "If the point were not already adjudged it would admit of grave consideration whether the legislature of a state can surrender this power of taxation, and make its action in this respect binding upon its successors, any more than it can surrender its police power or its right of eminent domain." See also the statement in *Wilmington and Weldon R.R. v. Reid*, 13 Wall. 264, 267 (1872).

⁴⁷ 6 How. 301 (1848).

⁴⁸ This is the basis for the dissents of Justices McLean and Daniel. The Chief Justice wrote no opinion.

under its charter of 1830. In *Woodruff v. Trapnall* ⁴⁹ a closely divided court held that Arkansas had unconstitutionally attempted to repudiate her undertaking to accept the notes of a state-owned bank. The agreement to receive such notes constituted a contract between the state and the holders of notes in circulation at the time of the repeal act. *Curran v. Arkansas* ⁵⁰ likewise involved statutes regulating the affairs of a bank of which the state was sole stockholder. This bank was chartered in 1836 and suspended specie payments in 1839. A series of six laws enacted between 1843 and 1849 were held by the Supreme Court to have withdrawn the assets of the bank so as to impair the obligation of the contract between the bank and its creditors. The fact that the state was sole owner did not permit the diversion of the bank's assets to the state until all of the contractual obligations of the bank had been met.

Contracts between States and Other Governmental Agencies. It has been pointed out that the Marshall Court erroneously applied the obligation of contract clause to interstate compacts. ⁵¹ This mistake was corrected during the Taney period. In *Poole v. Fleegeer* ⁵² a compact between Kentucky and Tennessee, accepted by Congress, was dealt with under the appropriate constitutional clause. And when the original Kentucky-Virginia compact, involved in *Green v. Biddle*, ⁵³ came before the Court in the Wheeling Bridge case the Court made no reference to the obligation of contract clause. Instead it said that this compact had become "a law of the Union." ⁵⁴ Perhaps this may be termed a limitation of the contract clause, but it is neither a limitation upon the powers of the Court nor a discarding of traditional safeguards to private property. Certainly it is in entire accord with the letter and intent of the Constitution. ⁵⁵

⁴⁹ 10 How. 190 (1851). Justices Catron, Daniel, Nelson, and Grier dissented.

⁵⁰ 15 How. 304 (1853). Justices Catron, Daniel, and Nelson dissented.

⁵¹ *Supra*, p. 46.

⁵² 11 Pet. 185 (1837).

⁵³ 8 Wheat. 1 (1823).

⁵⁴ *Pennsylvania v. Wheeling, etc. Bridge Co.* 13 How. 518, 565 (1851).

⁵⁵ For the interpretation of the interstate compact clause see the study by Felix Frankfurter and James M. Landis, "The Compact Clause of the Constitu-

If the Taney Court saw fit to deal with interstate compacts under the compact rather than the contract clause that was not because it was averse to holding that the latter could be applied to intergovernmental agreements. It was during this period that the Court, for the first time, applied this clause to contracts between the states and the federal government. The earliest cases of this kind grew out of internal improvements financed by the federal government or of land grants to aid the states in constructing improved means of transportation. The great Cumberland Road, from Cumberland in Maryland to Wheeling on the Ohio River, was constructed at federal expense with the consent of the states through which it passed. Since no funds for the maintenance of the road were provided, it soon fell into disrepair. The states immediately concerned agreed to take over and maintain the road, on condition that they be allowed to collect tolls from those using the road. Ohio, through which the road had been extended, agreed that "no toll shall be received or collected for the passage of any stage or coach conveying the United States mail, or horses bearing the same, or any wagon or carriage laden with the property of the United States. . . ." Pennsylvania agreed "that no toll shall be received or collected for the passage of any wagon or carriage laden with the property of the United States. . . ." A few years later an act of Pennsylvania provided that vehicles carrying the property of the United States should thereafter be exempt only in proportion to the amount of property in such carriage belonging to the United States, and that mail coaches or stages carrying passengers or goods should pay half toll upon such mode of conveyance. The Court found that this was a violation of the agreement, an attempt to require the federal government to bear part of the expense of upkeep when it was expressly stipulated that it should hereafter bear none.⁵⁶ Attorney General Nelson

tion—A Study in Interstate Adjustments," 34 *Yale Law Journal*, 685-758 (1925). There is a valuable appendix containing a list of all of the interstate compacts to 1925, and a bibliography of other writings on the subject.

⁵⁶ *Searight v. Stokes*, 3 How. 151 (1845).

argued that this was a tax upon a federal instrumentality,⁵⁷ but this was not the basis of the decision. Indeed all of the parties seem to have assumed the relevance of the contract clause and the decision turned upon the interpretation of the contract. Chief Justice Taney uses the terms contract and compact interchangeably, and although he says that a contract of this kind should not be construed as if it were one between private persons,⁵⁸ he has no hesitancy in applying the constitutional clause intended by the Framers to protect contracts between individuals.⁵⁹ The similar tax imposed by Ohio was held to be an impairment of contract in a case decided a little later in the same term.⁶⁰ Again the only point at issue appears to be the interpretation of the contract.

It has been pointed out that both sides in the Dartmouth College case agreed that if the college were a public corporation its regulation could not be restrained by the contract clause.⁶¹ The assumption that contracts between states and their political subdivisions are not contracts within the protection of the obligation of contracts clause of the Constitution has not subsequently been questioned by the Court. During the Taney period it was applied in two cases. In *East Hartford v. Hartford Bridge Company*,⁶² the Court ruled that where a town is granted the right to operate an enterprise, even though it be one ordinarily operated by private persons, the grant is not a contract within the meaning of the constitutional prohibition, but a "public law." The case involved the validity of an act repealing the right to operate a ferry, but from the opinion it would appear

⁵⁷ 3 How. 159.

⁵⁸ 3 How. 167.

⁵⁹ Justice McLean dissented, not because he believed the contract unenforceable, but because he believed that the difference between the Pennsylvania and the Ohio agreements left the former free to tax the mails. Justice Daniel dissented, arguing that the Federal Government has no power to construct internal improvements. By building the road they acquired no rights. They could not claim exemption on a road they did not and do not control.

⁶⁰ *Neil, Moore & Co. v. Ohio*, 3 How. 720 (1845). Here only Daniel, J., dissented. In *Achison v. Huddleson*, 12 How. 293 (1851), a Maryland tax of the same effect was held invalid by a unanimous Court.

⁶¹ *Supra*, pp. 41-42.

⁶² 10 How. 511 (1850).

that the control over the most vital powers of government was in question. And although it had been held that franchises of this kind might be permanently granted to private corporations, Justice Woodbury, who spoke for the Court, finds that a state could not make a permanent grant to a local government "without destroying all legislative sovereignty, and checking most legislative improvements and amendments, as well as supervision over its subordinate bodies."⁶³

During the Marshall period no case arose involving the bearing of the contract clause upon appointments to public office. Justice Story, in his concurring opinion in the Dartmouth College case, expressed the view that a state could not dismiss an officer appointed for a definite term at a fixed salary.⁶⁴ On the other hand, Justice Woodbury, concurring in *West River Bridge v. Dix*, said that the position of public officers, so far as the limitations of the contract clause are concerned, is like that of municipal corporations.⁶⁵ Three years later the Court sustained a Pennsylvania statute shortening the term, decreasing the stipend, and changing the method of selection of canal commissioners.⁶⁶ Justice Daniel conceded that the "promised compensation for services actually performed and accepted may undoubtedly be claimed," but he also said that neither the tenure nor the selection of the public officers of a state can constitute an obligation upon the state under the contract clause of the Constitution.

Judicial Decision and the Impairment of Contract. Where the Fourteenth Amendment prohibits the states from depriving "any person of life, liberty, or property without due process of law," Section 10 of Article I provides that "no state shall . . . pass any . . . law impairing the obligation of contracts." It is consequently unconstitutional for a state acting through any agency to deprive a person of due process. It is necessary for a state to pass a law in order to violate the contract clause. A

⁶³ *Ibid.*, p. 534.

⁶⁴ 4 Wheat. 519 at 694.

⁶⁵ 6 How. 507, 548 (1848).

⁶⁶ *Butler v. Pennsylvania*, 10 How. 402 (1851).

state court's action in deciding that a contract was not validly made, or has expired, could not ordinarily be the basis for invoking Section 10, Article I, of the Constitution. If that decision involved the interpretation or review of a state statute, the situation might be very different. Under certain circumstances, later to be discussed,⁶⁷ the action of the state court could be reviewed in the federal courts. And it is not entirely clear that in fact the court has invariably adhered to its own principle that a state judicial decision cannot impair a contract.

It has been pointed out in connection with the cases involving tax exemptions that the Court declared that it would not always follow the decisions of the state courts as to the existence of a contract. The Supreme Court has reserved to itself the final authority to determine whether a contract existed, the nature of its obligations, and whether a state law has impaired these obligations. In *Piqua Branch of the State Bank v. Knoop*,⁶⁸ *Ohio Life Insurance and Trust Co. v. Debolt*,⁶⁹ and *Jefferson Branch Bank v. Skelly*⁷⁰ the Court determined for itself the validity of a state law which had, by a state court, been held contrary to the state's constitution. By holding that the law had been constitutionally made the Supreme Court found that a valid contract had existed, and had been impaired by subsequent legislation. The contract was not impaired by the decision of the state court but by the statutes adopted after the contracts had been made. If there had been no subsequent legislation, there would have been no right of appeal from the decision of the state court to the Supreme Court under the contract clause. But in *Gelpcke v. Dubuque*⁷¹ a decision of Taney's last term as Chief Justice, the Supreme Court overruled a state court's decision concerning the validity of a municipal bond issue. Here there had been no subsequent legislation which could be said to have impaired the contract. The decision and its sequels indicate a strong desire

⁶⁷ *Infra*, ch. XI.

⁶⁸ 16 How. 369 (1853).

⁶⁹ 16 How. 416 (1853).

⁷⁰ 1 Black 436 (1861).

⁷¹ 1 Wall. 175 (1864).

to protect the interests of foreign bond holders against the wishes of certain communities to avoid payment of their obligations, but the constitutional justification for the decisions has never been entirely clear.

In 1857 the city of Dubuque, Iowa, acting under legislative authorization, issued bonds in aid of a railroad. This action of the city was in accordance with several decisions of the Iowa Supreme Court. In 1862, however, that court reversed its previous decisions and held the bond issue to be contrary to the state constitution. An action was brought in the federal district court for the Iowa district, and from its decision the case was taken to the Supreme Court on writ of error.⁷² That Court refused to accept the contention of counsel for Dubuque that the federal courts should follow the latest adjudications of the state courts as to the meaning of their own constitution.. "It cannot be expected," said Justice Swayne, "that this court will follow every such oscillation, from whatever cause arising, that may possibly occur. The earlier decisions, we think, are sustained by reason and authority."⁷³ This case, he continued, and two similar ones in another state, stand out "in unenviable solitude and notoriety." And however they may affect the future, they "can have no effect upon the past." He quotes with approval the dictum of Chief Justice Taney in the *Debolt* case, "The sound and true rule is, that if a contract, when made, was valid by the laws of the state as then expounded by all the departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law."⁷⁴ This principle applies when there is a change in the interpretation of the state constitution by a state court. Justice Swayne concedes that "it is the settled rule of this court in such cases, to follow the decisions of the state courts. But there have been heretofore . . . as doubtless

⁷² *Gelpcke v. Dubuque*, 1 Wall. 175 (1864).

⁷³ *Ibid.*, pp. 205-06.

⁷⁴ *Ohio Life Insurance and Trust Co. v. Debolt*, 16 How. 416, 432 (1853). See also *Rowan v. Runnels*, 5 How. 134 (1847).

there will be hereafter, many exceptional cases. We shall never immolate truth, justice, and the law, because a state tribunal has erected the altar and decreed the sacrifice.”⁷⁵

In a vigorous dissenting opinion Justice Miller said that the majority opinion was “accompanied by language as unsuited to the dispassionate dignity of this Court, as it is disrespectful to another Court of at least concurrent jurisdiction over the matter in question.”⁷⁶ He insisted that there was no “question of the obligation of contracts, or the right to enforce them.”⁷⁷ To assume that a contract had existed and was about to be violated by the Iowa court is to beg the question in dispute. It is impliedly conceded that if the bonds had been issued after the recent state court decisions they would be held invalid. After an examination of the relevant precedents he concludes that the Supreme Court has taken a step in advance of anything previously decided on this subject, a step “in the direction of a usurpation of the right, which belongs to the state courts, to decide as a finality upon the construction of state constitutions and state statutes.”⁷⁸

The application of the Gelpcke rule came after the death of Taney,⁷⁹ but the equivocal use of the contract clause in that decision is a not unfitting conclusion to the classic era of the clause’s history. It marks the end of the period of expansion, a process carried so far that here the relevance of the clause is denied while its doctrine is employed. Truly this is a decision “which it took the Court a good while to explain.”⁸⁰

Opposition to Contract Clause Decisions in the Taney Period. After about 1830 there was relatively little opposition to the contract clause decisions of the Supreme Court. It was, with rare exceptions, following accepted principles. There were, however, some cases which resulted in renewed and bitter criticism.

⁷⁵ 1 Wall. 175 at 206-07.

⁷⁶ *Ibid.*, p. 209.

⁷⁷ *Ibid.*, p. 210.

⁷⁸ *Ibid.*, p. 220.

⁷⁹ *Infra*, ch. XI.

⁸⁰ Holmes, J., dissenting, in *Muhlker v. N. Y. & Harlem R.R. Co.*, 197 U. S. 544 at 573 (1905).

Probably the greatest amount of criticism and abuse was occasioned by the Charles River Bridge ruling.⁸¹ Here it was the Whigs, successors to the Federalist economics of Hamilton and Marshall, who were dissatisfied. To many of them this decision heralded the virtual end of the Constitution of the Fathers, or at least of the Constitution of Marshall. *Piqua Branch Bank v. Knoop* "produced a great sensation, not only in Ohio, but in many states whose legislature had granted similar exemptions to state banks."⁸² In this instance the opposition is similar to that directed against the Marshall contract decisions, rather than to the opposition to the Charles River Bridge case. The *Cincinnati Enquirer* referred to "this truly outrageous decision by the truly Federal Court. The sober mind may begin to wonder how this unrighteousness can possibly be imposed upon a community in a democratic or, if you please, in a republican form of government." It attacked the Court as a "silk-gowned fogycdom, a goodly portion of it imbecile with age, a portion anti-republican in notions, a portion wedded to the antiquated doctrine of established precedents, no matter whether truth or fallacy." The decision was clearly "an invasion of State sovereignty and a great outrage upon State-Rights."⁸³ Two years later the antagonism of the people of Ohio was again aroused by the decision in *Dodge v. Woolsey*.⁸⁴ So strong was the local opposition that for over two years the Ohio Supreme Court refused to enter the mandate of the Supreme Court of the United States in the Piqua Branch Bank case. When it did so its Chief Justice dissented, saying that the decision in its "enormities and alarming import . . . wholly prostrates the municipal sovereignty of the people of the state."⁸⁵

Eight years later the decision in *Gelpcke v. Dubuque* gave rise to further opposition to the Court. The doctrine announced in that case became "a somewhat serious factor in the history

⁸¹ Warren, *The Supreme Court*, II, 302-06.

⁸² *Ibid.*, p. 526.

⁸³ *Cincinnati Enquirer*, May 26, 30, June 2, 1854.

⁸⁴ 18 How. 331 (1856).

⁸⁵ Warren, *The Supreme Court*, II, 530.

of the relations of the Court to the American people. For owing to the pronounced feelings of hostility to the Federal Judiciary which these bond decisions aroused through the Central West, popular confidence in, and support of, the supreme tribunal were weakened, at the precise time when such confidence and support were especially needed.”⁸⁶ The result of this firm policy of the Court in requiring that cities and counties fulfill their obligations was to arouse in parts of the country — especially Missouri, Iowa, Kansas, Wisconsin, Michigan, and the southern states — “a considerable feeling of hostility.” In 1878 a bill was introduced into Congress providing that no municipal or public corporation could be sued in the United States courts. No action was taken on the measure, but it is indicative of the antagonism to the federal judiciary aroused by these decisions.⁸⁷

Reservation Clauses in State Constitutions. It was pointed out in the preceding chapter that, although reservation clauses in incorporation statutes began to appear early in the century, the first approach to a constitutional clause of the kind was that of Delaware in 1831.⁸⁸ By 1865 some fourteen states had included a more or less general reservation clause in their constitutions. The Pennsylvania constitution of 1838 contained a provision reserving to the legislature the right “to alter, revoke or annul” charters provided it be done in such manner that “no injustice be done to the corporators,” but this provision applied only to “corporate bodies with banking or discounting privileges.”⁸⁹ The Louisiana constitution of 1845 followed with the surprising postponement: “From and after the month of January 1890, the legislature shall have the power to revoke the charters of all corporations whose charters shall not have expired previous to that time.”⁹⁰ The Texas constitution of the same year required a two-thirds vote in the legislature for the creation of a corporation and empowered the legislature by the

⁸⁶ Warren, III, 253.

⁸⁷ *Ibid.*, 397-401.

⁸⁸ *Supra*, p. 59.

⁸⁹ Article I, Sec. 25.

⁹⁰ Title VI, Art. 124.

same majority to repeal "all private corporations, by making compensation for the franchise."⁹¹ The Iowa constitution of 1846 also required a two-thirds vote to amend or repeal corporate charters.⁹² However, the New York constitution of that year included a general reservation of the power to alter or repeal all "general laws and special acts" of incorporation.⁹³ The wording of the New York clause was evidently the model for the reservation clauses in the Wisconsin constitution of 1848,⁹⁴ the California constitution of 1849⁹⁵ and the Michigan constitution of 1850.⁹⁶ During the fifties and sixties many of the states followed their example. Other states — for example, New Jersey,⁹⁷ Kentucky,⁹⁸ and Rhode Island⁹⁹ — adopted reservation clauses in their general incorporation laws, while still others continued to rely upon clauses in special acts of incorporation.

The effect of the doctrine that the taxing power may be granted away is seen in several of the constitutional provisions, although it was not until after the Civil War that many states adopted special reservations on this subject. In the Iowa constitution of 1846 it is provided that "the property of all corporations for pecuniary profit, now existing or hereafter created, shall be subject to taxation, the same as that of individuals."¹⁰⁰ Much the same provision is to be found in the Kansas constitution of 1858,¹⁰¹ the Nevada constitution of 1864,¹⁰² and in many others of the next two decades.

One would expect to find the adoption or rejection of reservation clauses in the state constitutional conventions accompanied by debates in which the merits of the Supreme Court's inter-

⁹¹ Art. VII, Sec. 31.

⁹² Art. VIII, Sec. 12.

⁹³ Art. VIII, Sec. 1.

⁹⁴ Art. XI, Sec. 1.

⁹⁵ Art. IV, Sec. 31.

⁹⁶ Art. XV, Sec. 1.

⁹⁷ *Acts of 70th Legislature of New Jersey* (1846), 16.

⁹⁸ *Stanton's Revised Statutes*, II, ch. 62, 121.

⁹⁹ *Revised Statutes*, Title IX, ch. 125, Sec. 14.

¹⁰⁰ Art. VIII, Sec. 2.

¹⁰¹ Art. XIV, Sec. 3.

¹⁰² Art. VIII, Sec. 2.

pretation of the contract clause would be discussed. Such discussion is rare. There is a good deal of debate concerning the virtues and evils of corporations. Most of the conventions, at least after the first quarter of the nineteenth century, had their corporation and anti-corporation blocs. Much is said of the great services rendered by corporations and of the need for preserving inviolate their grants and privileges. A number of speakers declared that a reservation clause would be of no use, that "it would place the constitution in opposition to the Constitution of the United States."¹⁰³ There are a few speeches in which the doctrine of the Dartmouth College case is bitterly, if not very learnedly criticised.¹⁰⁴ These are, however, exceptional rather than typical. Only in the adoption of the reservation clauses is there any very definite evidence of a general desire to limit the effects of the Supreme Court's rulings.¹⁰⁵

Contract Clauses in State Constitutions. In the Taney as in the Marshall period the adoption of reservation clauses went hand in hand with the insertion of clauses prohibiting the legislatures from passing any law impairing the obligation of contracts. At the close of Marshall's term twelve state constitutions included such a prohibition. By 1865 fourteen additional states

¹⁰³ *Debates of the Michigan Constitutional Convention of 1850*, pp. 587-89.

¹⁰⁴ One of the best speeches is that by Mr. Earle in the Pennsylvania Convention of 1837. See *Debates*, V, 570-73. For less clear discussions see *Debates in the Ohio Constitutional Convention, 1850-51*, I, 363; B. F. Shambaugh (ed.), *Iowa Constitutional Conventions of 1844 and 1846*, p. 142; *Debates in the Iowa Constitutional Convention of 1857*, I, 105-06, 149; *Debates in the Michigan Constitutional Convention of 1850*, pp. 587-88; *Debates of the Oregon Constitutional Convention of 1857*, pp. 254-55. An extreme instance of misunderstanding is found in the speech of Mr. Gorman in the Minnesota Convention of 1857: "As to our passing a law impairing the obligations of contracts, we are prohibited by the Constitution of the United States from doing that, but to what class of contracts does it refer? If it is a contract with a railroad or any other corporation of a public character, you may pass any act you please, impairing it. So says Chief Justice Marshall." F. H. Smith (ed.), *Debates*, p. 229.

¹⁰⁵ In *Sherman v. Smith*, 1 Black 587 (1862), a reservation clause contained in a state statute was given as an alternative ground for sustaining a subsequent act, but in this opinion there was nothing beyond the briefest mention of the effect of such a clause. The cases in which such clauses are applied become numerous well after 1865, and a discussion of their legal consequences falls in the second part of this study.

had adopted a constitution including a contract clause.¹⁰⁶ These clauses, like those of the preceding decades, were patterned upon that of the national Constitution, not upon that of the Ordinance of 1787 for the Northwest Territory. They served to protect, that is to say, not merely *bona fide* private contracts, but all contracts which the Supreme Court had seen fit to bring within the scope of the national clause. And, as in the previous period, these clauses were included in the bills of rights. Certainly this appears to indicate that neither such clauses nor the general trend of the Supreme Court's interpretation of the contract clause met with general disapproval. For these constitutions were the product of a rapidly expanding electorate, in a period marked by an increasing self-consciousness and self-confidence of the common man. The constitutional conventions of these years were not dominated, as some of their earlier predecessors had been, by the "rich and well-born," and the constitutions themselves were usually ratified by popular vote. Furthermore, although the movement to include contract clauses in state constitutions originated in the East, it was the new states of the West which showed the greatest enthusiasm for them. Eleven of the fourteen states adopting contract clauses between 1836 and 1865 were west of the Appalachians. Indeed, with the exception of Vermont, whose first constitution was written in 1777 so that in all except legal form it may be included among the older states, every new state admitted before 1865 followed the example of Pennsylvania, which had adopted a contract clause in 1790. On the other hand nine of the original states had not

¹⁰⁶ Arkansas, California, Florida, Iowa, Kansas, Louisiana, Minnesota, New Jersey, Nevada, Oregon, Rhode Island, Texas, West Virginia, Wisconsin. Louisiana had included no contract clause in its first constitution (1812), which contained no bill of rights, but did so in its second (1845). The New Jersey and Louisiana provisions are unusually inclusive. That of New Jersey is as follows: "The legislature shall not pass any . . . law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made" (constitution of 1844, Art. IV, Sec. 7). The Louisiana constitution of 1845 provides that "No law impairing the obligation of contracts shall be passed, nor vested rights be divested unless for purposes of public utility, and for adequate compensation previously made" (Art. VI, Sec. 109).

by 1865 adopted such a clause.¹⁰⁷ It would be erroneous to assume that there was less zeal for the protection of property rights in the older states, although some of those states did demonstrate more interest in statutory reservation clauses than in contract clauses. Doubtless the explanation is to be found in the fact, first, that not all of them adopted new constitutions during these years, and, second, that those adopting new constitutions were more likely to take their original constitutions and bills of rights as models than to look to the example of the national Constitution or to the practice of the other states.

¹⁰⁷ Connecticut, Delaware, Georgia, Maryland, Massachusetts, New Hampshire, New York, North Carolina, and South Carolina. The Georgia and South Carolina constitutions of 1865, adopted immediately after the Civil War, did include such a clause.

PART II

THE APPLICATION OF THE CONTRACT CLAUSE

CHAPTER IV

THE LATER HISTORY OF THE CONTRACT CLAUSE: A GENERAL SURVEY

THERE are three striking characteristics of the history of the contract clause since 1864. The first is that the period of its doctrinal expansion had ended. It had been invoked in but sixty-three cases before 1865, and yet there had by this time been stated every major principle, and most of the minor ones as well, to be found in the many subsequent opinions. It remained only to work out their application to new factual situations. The most interesting development in the law of the contract clause during its later years is the growth of the concept of an inalienable police power. This represents not an attempt further to expand the scope of the clause, but a means of restricting that scope in its application to certain varieties of legislation believed to be of especial importance to the health, morals, or safety of the community. Furthermore, the principle that some legislative powers may not be bargained away was first developed not by the Supreme Court, but by the state courts and by the authors of legal treatises.

A second characteristic of the later history of the contract clause is that an even smaller proportion of the cases involved statutes dealing with contracts between private persons. This is the period of the rapid growth of business corporations, as it is the period of the multiplication of attempts by the states to regulate those entities. And, especially toward the turn of the century, it is the period in which many a unit of government began to regret the liberality of earlier grants to corporations, and to attempt to avoid the consequences of the principles in *New Jersey v. Wilson* and the Dartmouth College case.

The third characteristic of this era is that it marks both the ascendancy of the clause and its decline. Until late in the century it was far more frequently before the Court than any other

clause of the Constitution, excepting only the commerce clause. Since that time its importance has steadily declined. Partly because of the effect of the general adoption of the right to amend or repeal franchises or other grants, partly because of the greater scope and flexibility of the expanded due process clause, it ceased to be the bulwark of vested interests and came to be a clause of distinctly secondary importance.

A quantitative survey of the cases decided between 1865 and June 1937 may serve to make clearer some of the general features in this period of the history of the contract clause.

One of the frequent misconceptions about the history of the Supreme Court is that it was inactive during the period of reconstruction. The basis of this assumption seems to be that because of the setback to the Court's prestige occasioned by the Dred Scott decision, and because of a fear that it would endanger its own existence if it attempted to oppose the will of the Congressional radicals, the Court dared not exercise the power of declaring acts invalid. Even if correct, this would apply only to Congressional statutes, and here it most certainly does not apply, although it is true that the Court did refuse to interfere with the reconstruction acts. Up to 1864 there were two, possibly three, cases in which federal legislation was held unconstitutional.¹ In the eight years of Chief Justice Chase (1865-1873) there were ten. This remarkable increase in the mortality rate does not apply so far as decisions on state legislation are concerned, but there the figures are striking enough. Before 1865 the Court held state acts invalid in fifty-eight cases.² Be-

¹ The clear cases are *Marbury v. Madison*, 1 Cranch 137 (1803), and *Dred Scott v. Sandford*, 19 How. 393 (1857). The doubtful case is *U. S. v. Yale Todd*, 13 How. 40, 51, 53. On this see C. G. Haines, *American Doctrine of Judicial Supremacy* (2d ed., 1932), p. 176; Charles Warren, *Congress, the Supreme Court and the Constitution* (1925), p. 332. Convenient lists of all decisions in which acts of Congress have been held unconstitutional are to be found in Haines, pp. 542-66, Warren, pp. 304-40, and Library of Congress, *Provisions of Federal Law Held Unconstitutional by the Supreme Court of the United States* (Government Printing Office, 1936). Cf. Henry W. Edgerton, "The Incidence of Judicial Control over Congress," 22 *Cornell Law Quarterly*, 299 (1937).

² The list of such decisions in B. F. Moore, *The Supreme Court and Unconstitutional Legislation* (1913), pp. 131 *et seq.*, contains a number of omissions.

tween 1865 and 1873 there were fifty-two such cases. In this short period there were twenty cases in which state acts were held invalid as being contrary to the contract clause. Furthermore, the proportion of cases in which laws considered under this clause were held unconstitutional reaches a new and all-time high of almost sixty per cent of the total number of cases considered under this clause. This mortality rate is in but very small part due to certain legislation growing out of Civil War and reconstruction conditions. Primarily it is indicative of the economic importance of the clause in this period. Of the twenty cases, eight involved private contracts. Three or four of this number had to do with private debts and appear to have some definite relation to the fears of 1787.³ One involved a change in pilotage fees.⁴ The others grew out of new state constitutional provisions, the product of the "carpet bag" regime, relating to slavery or payment in Confederate money.⁵ There were twelve cases involving contracts to which a state was a party. Most of them have to do with tax exemptions,⁶ the remainder with a variety of regulatory statutes.⁷

During the fifteen years of Morrison R. Waite's chief justiceship (1873-1888) the ascendancy of the contract clause continued, although these are also the years in which a broader interpretation of due process was hesitatingly being developed by the Court. But until the nineties the due process clause was

³ *Hathorn v. Calef*, 2 Wall. 10 (1865); *Gunn v. Barry*, 15 Wall. 610 (1873); *Walker v. Whitehead*, 16 Wall. 314 (1873). *Cleveland P. & A. R.R. Co. v. Pennsylvania*, 15 Wall. 300 (1873), should probably be added to this group, for although it involves taxation of a corporation it is decided upon the basis of the contract existing between the corporation and the stockholders.

⁴ *Pacific Mail Steamship Co. v. Joliffe*, 2 Wall. 450 (1865).

⁵ *White v. Hart*, 13 Wall. 646 (1872); *Osborn v. Nicholson*, 13 Wall. 654 (1872); *Delmas v. Merchant's Mutual Ins. Co.*, 14 Wall. 661 (1872).

⁶ *McGehee v. Mathis*, 4 Wall. 143 (1866); *Home of Friendless v. Rouse*, 8 Wall. 430 (1869); *Washington University v. Rouse*, 8 Wall. 439 (1869); *Wilmington & Weldon R.R. Co. v. Reid*, 13 Wall. 264 (1872); *Raleigh & Gaston R.R. Co. v. Reid*, 13 Wall. 269 (1872); *Tomlinson v. Branch*, 15 Wall. 460 (1873); *Humphrey v. Pegues*, 16 Wall. 244 (1873).

⁷ *The Binghampton Bridge*, 3 Wall. 51 (1866); *Von Hoffman v. Quincy*, 4 Wall. 535 (1867); *Furman v. Nichol*, 8 Wall. 44 (1869); *Chicago v. Sheldon*, 9 Wall. 50 (1870); *Davis v. Gray*, 16 Wall. 203 (1873).

of slight importance. Between 1873 and 1888 there were twenty-nine cases in which state legislation was held unconstitutional because of an impairment of the obligation of contracts. Most of the statutes involved are of a kind familiar to the Court during the Chase and, usually, the Taney periods. Five had to do with purely private contracts, but only one of them involved legislation of the kind which the Framers had in mind.⁸ The others involved Civil War or reconstruction legislation — statutes providing for the payment of contracts in Confederate money or sequestrating private debts.⁹ There were twenty-four decisions of unconstitutionality where contracts to which states were parties were in question. Twelve had to do with taxation and tax exemption.¹⁰ One concerned the issuance of state bonds.¹¹ Four (not to mention a number in which the same principle was applied) involved legislation altering the previously agreed upon rules as to the receivability by the state of coupons attached to its bonds.¹² One had to do with the abolition of the office of state geologist.¹³ Two involved the regulation of state chartered banks.¹⁴ And four are of a kind new to the Court — constitutional or statutory provisions attempting to revoke a monopolistic grant to a public utility.¹⁵

⁸ *Edwards v. Kearzy*, 96 U. S. 595 (1878).

⁹ *Wilmington, etc. R.R. v. King*, 91 U. S. 3 (1875); *Williams v. Bruffy*, 96 U. S. 176 (1878); *Stevens v. Griffith*, 111 U. S. 48 (1884); *Effinger v. Kenney*, 115 U. S. 566 (1885).

¹⁰ *Pacific R.R. Co. v. Maguire*, 20 Wall. 36 (1874); *New Jersey v. Yard*, 95 U. S. 104 (1877); *Farrington v. Tenn.*, 95 U. S. 679 (1878); *Murray v. Charleston*, 96 U. S. 432 (1878); *Northwestern Univ. v. People ex rel. Miller*, 99 U. S. 309 (1879); *Wolff v. New Orleans*, 103 U. S. 358 (1881); *Louisiana v. Pilsbury*, 105 U. S. 278 (1882); *Asylum v. New Orleans*, 105 U. S. 362 (1882); *Ralls County v. U. S.*, 105 U. S. 733 (1882); *Louisiana v. Police Jury*, 111 U. S. 716 (1884); *Fisk v. Jefferson Police Jury*, 116 U. S. 131 (1885); *Seibert v. U. S.*, 122 U. S. 284 (1887). To these might be added the ambiguous decision in *New Orleans v. Houston*, 119 U. S. 265 (1886).

¹¹ *Board of Liquidation v. McComb*, 92 U. S. 531 (1876).

¹² *Hartman v. Greenhow*, 102 U. S. 672 (1881); *Virginia Coupon Cases*, 114 U. S. 270, 307, 309, 311 (1885); *Royall v. Virginia*, 116 U. S. 572 (1886); *Sands v. Edmunds*, 116 U. S. 585 (1886).

¹³ *Hall v. Wisconsin*, 103 U. S. 5 (1880).

¹⁴ *Baring v. Dabney*, 19 Wall. 1 (1874).

¹⁵ *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650 (1885); *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674 (1885); *Louisville Gas Co. v.*

It is clear that with *Fletcher v. Peck*¹⁶ in 1810 the Supreme Court history of the contract clause began. No definite date can be given at which the decline of that clause's importance sets in. But it is unquestionably true that the clause reached its peak at about the end of the Waite period. After that time it is of steadily diminishing significance. It is more than a coincidence that the first due process case in which that clause is made the basis of a decision holding invalid a statute regulating a business corporation came in 1890.¹⁷ After the Minnesota Commission case the Court steadily broadened the scope of due process, very much as Marshall had enlarged the contract clause earlier in the century. The contract clause has never ceased to be a factor in American constitutional law, but it has been of less and less relative importance since the Court began to give to due process a breadth which made it an even more inclusive sanctuary for economic interests desirous of securing a judicial limitation upon state regulatory activity than was the contract clause during the eighty years preceding 1890. In the development of due process there has so far been no decision comparable in its effects to *Ogden v. Saunders*.¹⁸

Before 1889 the contract clause had been considered by the Court in almost forty per cent of all cases involving the validity of state legislation. So successfully was its protection invoked that it was the constitutional justification for seventy-five decisions in which state laws were held unconstitutional, almost half of all of those in which such legislation was declared invalid by the Supreme Court. Since that time it has been resorted to less and less frequently, and in many of the cases where it has been invoked the plaintiff has relied upon the due process and equal protection clauses as well as the contract clause.

During the tenure of Chief Justice Fuller (1888-1910) slightly less than twenty-five per cent of the cases involving the

Citizens' Gas Co., 115 U. S. 683 (1885); *St. Tammany Water Works Co. & City of New Orleans v. New Orleans Water Works Co.*, 120 U. S. 64 (1887).

¹⁶ 6 Cranch 87 (1810).

¹⁷ *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U. S. 418 (1890).

¹⁸ *Supra*, p. 50.

validity of state legislation have to do with the contract clause. In twenty-eight of these cases the statute involved was declared unconstitutional. Of them two were private contract cases, both concerning statutes having to do with the payment or redemption of mortgages.¹⁹ There is still a rather large number involving the power of taxation, nine cases, although some of them present new types of problems.²⁰ But an even larger number involve the regulation of public utilities, or the problem of monopolistic grants by cities to such corporations.²¹ The remaining cases involved attempts to alter the terms of land grants,²² to require a deposit from foreign corporations,²³ to change the status of state bonds or warrants,²⁴ and to abolish an area of local government without providing for the payment of its debts.²⁵

If the proportion of contract cases to all others in which the validity of state legislation is considered by the Court be represented graphically, the downward course of the line which began at about the centenary of the Judiciary Act continued throughout the periods of Chief Justice White (1910-1921) and Chief

¹⁹ *Barnitz v. Beverly*, 163 U. S. 118 (1896); *Bradley v. Lightcap*, 195 U. S. 1 (1904).

²⁰ *Mobile & Ohio R.R. v. Tenn.*, 153 U. S. 486 (1894); *N. Y., Lake Erie & Western R.R. Co. v. Penn.*, 153 U. S. 628 (1894); *Bank of Commerce v. Tenn.*, 161 U. S. 134 (1896); *Stearns v. Minnesota*, 179 U. S. 223 (1900); *Citizen's Bank v. Parker*, 192 U. S. 73 (1904); *Graham v. Folsom*, 200 U. S. 248 (1906); *Powers v. Detroit, Grand Haven & Milwaukee Ry.*, 201 U. S. 543 (1906); *American Smelting Co. v. Colorado*, 204 U. S. 103 (1907); *Wright v. Georgia R.R. & Banking Co.*, 216 U. S. 420 (1910).

²¹ *City Ry. Co. v. Citizen's R. R. Co.*, 166 U. S. 557 (1897); *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1 (1898); *Detroit v. Detroit Citizen's St. Ry. Co.*, 184 U. S. 368 (1902); *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65 (1902); *Cleveland v. Cleveland City Ry. Co.*, 194 U. S. 517 (1904); *Muhlker v. N. Y. & Harlem R. R. Co.*, 197 U. S. 544 (1905); *Cleveland v. Cleveland Electric Ry. Co.*, 201 U. S. 529 (1906); *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453 (1906); the same, 206 U. S. 496 (1907); *Cleveland Electric Ry. Co. v. Cleveland & Forest City Ry. Co.*, 204 U. S. 116 (1907); *Minneapolis v. Minneapolis Street Ry. Co.*, 215 U. S. 417 (1910).

²² *Pennoyer v. McConaughy*, 140 U. S. 1 (1891); *Houston & Texas Central Ry. v. Texas*, 170 U. S. 243 (1898).

²³ *Bedford v. Eastern Bldg. & Loan Assn.*, 181 U. S. 227 (1901).

²⁴ *McGahey v. Virginia*, 135 U. S. 662 (1890); *Houston & Texas Central Ry. v. Texas*, 177 U. S. 66 (1900).

²⁵ *Louisiana v. New Orleans*, 215 U. S. 170 (1909).

Justice Taft (1921-1930). The proportion of contract cases during Chief Justice White's term was fifteen per cent, and in that of Chief Justice Taft only nine per cent.²⁶ During the twenties, that is to say, the proportion of contract cases is barely a fourth as high as it had been before 1890. Furthermore, a very large proportion of the contract cases involve due process as well; frequently the latter is of primary importance. In Chief Justice White's term of office fourteen cases resulted in decisions of unconstitutionality. In Chief Justice Taft's there were ten. The number of these which involve contracts between private persons approaches and then reaches the vanishing point, for the only case of the kind in these years came in 1921, just before Taft became Chief Justice.²⁷ On the other hand the increasing amount of government regulation of public utilities is clearly reflected. During the White period there was one case involving the problem which earlier took up so much of the Court's time, tax exemption,²⁸ and one involving an attempt to evade the payment of a county's bonded indebtedness.²⁹ There were twelve in which the Court ruled against municipal or state acts seeking to impose new regulations upon public utilities.³⁰ The very high mortality rate of statutes brought to the Court in the Taft era,³¹ a rate higher than at any time be-

²⁶ Taking the Chief Justices' terms of office as convenient periods, the proportion of cases under the contract clause to all cases in which the constitutionality of state legislation is concerned, are as follows: Marshall 38 per cent, Taney 44 per cent, Chase 32 per cent, Waite 40 per cent, Fuller 24 per cent.

²⁷ *Bank of Minden v. Clement*, 256 U. S. 126 (1921).

²⁸ *Central of Georgia Ry. Co. v. Wright*, 248 U. S. 525 (1919).

²⁹ *Hendrickson v. Apperson*, 245 U. S. 105 (1917).

³⁰ *Louisville v. Cumberland Tel. & Tel. Co.*, 224 U. S. 649 (1912); *Grand Trunk Western Ry. Co. v. South Bend*, 227 U. S. 544 (1913); *Owensboro v. Cumberland Tel. & Tel. Co.*, 230 U. S. 58 (1913); *Boise Water Co. v. Boise*, 230 U. S. 84 (1913); *Old Colony Trust Co. v. Omaha*, 230 U. S. 100 (1913); *Russell v. Sebastian*, 233 U. S. 195 (1914); *Carondelet Canal & Navigation Co. v. Louisiana*, 233 U. S. 362 (1914); *Detroit United Ry. v. Michigan*, 242 U. S. 238 (1916); *Cincinnati v. Cincinnati & Hamilton Traction Co.*, 245 U. S. 446 (1918); *Northwestern Ohio Traction & Light Co. v. Ohio*, 245 U. S. 574 (1918); *Covington v. South Covington v. Cincinnati Ry. Co.*, 246 U. S. 413 (1918); *Detroit United Ry. v. Detroit*, 248 U. S. 429 (1919).

³¹ The statistics regarding statutory mortality in Supreme Court decisions since 1925 are somewhat influenced by the fact that, after the Judiciary Act of 1925,

tween the reconstruction period and 1935, is reflected in the contract decisions. For although there were few cases of this kind, absolutely as well as relatively, in a large proportion the verdict went against the validity of the statute. Of the ten cases where the decision was one of unconstitutionality, two involved tax exemptions,³² one the payment of a tax collector,³³ and one the regulation of waterfront lands and docks.³⁴ There were six cases where the power of state or local governments to regulate public utilities was in question.³⁵

The seven years during which Chief Justice Hughes has presided over the Court (1930-1937) do not quite fit into the neat pattern of the preceding three or four decades. For one thing there is a very slight increase in the proportion of cases considered under the contract clause in comparison with all other cases involving the validity of state legislation. From a low of nine per cent during the period of Chief Justice Taft it has climbed to thirteen per cent. That tiny growth is of little, if any, significance, particularly in view of the shortness of the period. More interesting is the character of the seven cases in which decisions of unconstitutionality were handed down. Not one of them involved a grant of tax exemption, although there is one of unprecedented character in which an inheritance tax as applied to a trust deed made before the statute was enacted was held invalid.³⁶ Not one involved a public utility. Only two

review ceased to be of right in most instances, and the Court took predominantly the cases where there was a fair chance that the constitutional claim would be upheld (Felix Frankfurter and James M. Landis, *The Business of the Supreme Court*, 1928, p. 280).

³² *Millsaps College v. Jackson*, 275 U. S. 129 (1927); *Macallen Co. v. Massachusetts*, 279 U. S. 620 (1929).

³³ *Robertson v. Miller*, 276 U. S. 174 (1928).

³⁴ *Appleby v. New York*, 271 U. S. 364 (1926); *Appleby v. Delaney*, 271 U. S. 403 (1926). The same acts are considered in both cases.

³⁵ *Columbia Ry., Gas & Electric Co. v. South Carolina*, 261 U. S. 236 (1923); *Georgia Ry. & Power Co. v. Decatur*, 262 U. S. 432 (1923); *Georgia Ry. & Power Co. v. College Park*, 262 U. S. 441 (1923); *Superior Water, Light & Power Co. v. Superior*, 263 U. S. 125 (1923); *Missouri, Kansas & Texas Ry. Co. v. Oklahoma*, 271 U. S. 303 (1926); *Ohio Public Service Co. v. Ohio*, 274 U. S. 12 (1927).

cussion of this case see p. 109, below.

had to do with the regulation of corporations, and both of these were concerned with the contractual relations of members of the corporation, not, as in nearly all of the corporation cases, with contracts between the state and the corporations.³⁷ Of the other cases two involved private contractual relationships,³⁸ and two the financial obligations of local governments.³⁹

Another paradoxical feature of this short period is that more than two-thirds (seventy-one per cent) of the contract cases came after the Minnesota Mortgage Moratorium case,⁴⁰ that is, after January 1934. That decision was at the time viewed with much the same alarm which greeted the Charles River Bridge case. Many people believed that it meant the final death blow to the restrictions which the Founding Fathers sought to impose upon legislative interferences with private contracts. Yet where there had been but eight contract cases in volumes 281 to 290 of the Supreme Court Reports, the clause figured in twenty cases coming before the Court in volumes 291 to 301. In other words, contract cases formed only eight per cent of those involving the validity of state legislation in this period until January 1934, but since that time have comprised eighteen per cent. It is interesting to notice, however, that taking the period as a whole the proportion of statutes successfully challenged under Article I, Section 10, has remained strikingly constant. In two of the eight cases in volumes 281 to 290 the

³⁷ *Coombes v. Getz*, 285 U. S. 434 (1932); *Treigle v. Acme Homestead Assn.*, 297 U. S. 189 (1936).

³⁸ *W. B. Worthen Co. v. Thomas*, 292 U. S. 426 (1934); *International Steel and Iron Co. v. National Surety Co.*, 297 U. S. 657 (1936).

³⁹ *W. B. Worthen Co. v. Kavanaugh*, 295 U. S. 56 (1935); *Ashton v. Cameron County Water District*, 298 U. S. 513 (1936). The latter case involved the Federal Municipal Bankruptcy Act of 1934, and it is perhaps doubtful whether it should be included here. The Federal Act was not, however, self-operating, for the legislative consent of the states was required. Such consent had been given by an act of the Texas legislature. And in holding the Congressional Act invalid the Court discussed the obligation of contracts principle, said that a state could not violate this principle "under the form of a bankruptcy act," and denied that "she can accomplish the same end by granting any permission necessary to enable Congress so to do" (*ibid.*, p. 531). In effect the Texas enabling act was held invalid.

⁴⁰ *Home Building & Loan Assn. v. Blaisdell*, 290 U. S. 398 (1934). For a discussion of this case see p. 109, below.

statutes were found invalid; and in five of the twenty cases since that time, a similar result was reached. The proportion of unconstitutional statutes has thus been twenty-five per cent both before and after the sudden spurt in contract clause litigation following the *Blaisdell* case.⁴¹ Hence, although none of the later statutes held invalid have involved stay laws or mortgage moratoria, it would seem that the *Blaisdell* case did not sound the death knell of the contract clause. Nor, on the other hand, would one be warranted in viewing the increased proportion of contract cases as an indication that the clause was again to assume a place of primary importance. Such an increase is perhaps more justifiably explained by reference to the flood of emergency legislation, much of which affected private rights and provided the occasion for increased litigation in this particular field.

It would be entirely unwarranted to base any general conclusions upon a small number of decisions handed down within a very short and recent period. Certainly there is not sufficient evidence to indicate that the contract clause is likely in the future to attain the position of importance which it held during the nineteenth century. Due process remains the more flexible and more inclusive concept. Perhaps these recent decisions indicate that the contract clause will be more frequently resorted to in the future to deal with the constitutional issues occasioned by legislative attempts to deal with the problems of economic depressions, for several of the statutes involved in the cases just considered were of that kind. But beyond that there seems to be no reason to believe that a revival of the contract clause is in prospect.

⁴¹ In the cases involving the validity of state legislation, exclusive of those decided under the contract clause, 26 per cent before January 1934 and 40 per cent since that time have resulted in decisions of unconstitutionality. In the seven-year period there were sixty-one cases, exclusive of the contract cases, in which state statutes were held invalid.

CHAPTER V

CONTRACTS BETWEEN PRIVATE PERSONS

IT HAS been pointed out that cases involving legislative interferences with purely private contracts were neither the first to be considered by the Supreme Court under the contract clause nor at any period a very numerous group. The only justification for dealing with them before other types of contract cases is that they alone seem to have some definite relation to the intentions of the Fathers. There is reason to believe that the contract clause was intended to prevent the enactment of statutes which would make private contractual obligations of less value, or in some way postpone the necessity for their payment, and no evidence has been found which would indicate that anything more was anticipated. Yet, in fact, only about ten per cent of the contract cases involve such contracts and some of these deal with statutes having but a slight resemblance to the kind of legislation which the Framers apparently had in mind. Although the debates in the struggle over ratification of the Constitution demonstrate that many of the Federalists held to the vague conception that the contract clause would help to prevent the states from issuing money or regulating its value, thereby interfering with private contracts, there have been no contract cases dealing with this problem. The definitely monetary clauses of Article I, Section 10,¹ proved entirely sufficient to deal with the rare instances of attempts by the states after 1789 to secure a cheaper and a larger volume of currency.²

Bankruptcy Laws. Because of their peculiar importance in the early history of the contract clause *Sturges v. Crowninshield*,³ *Ogden v. Saunders*,⁴ and the other cases in the Marshall

¹ "No State shall . . . coin Money; emit Bills of Credit; make anything but gold and silver coin a Tender in Payment of Debts. . . ."

² See *Craig v. Missouri*, 4 Peters 410 (1830); *Briscoe v. Bank of Kentucky*, 11 Peters 257 (1837).

³ 4 Wheat. 122 (1819). *Supra*, p. 48.

⁴ 12 Wheat. 213 (1827). *Supra*, p. 50.

period dealing with bankruptcy legislation were dealt with at some length in Chapter II. It was there pointed out that, although no evidence has been adduced that the Fathers objected to state bankruptcy legislation in effect in 1787, or that they expected the contract clause to apply to such legislation, there was no dissent from the opinion of Marshall in the *Sturges* case holding invalid a bankruptcy statute which was given a retrospective application. Whatever the intentions of the Framers, such statutes do alter the debtor-creditor relation, and if the grant of the power to Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States" ⁵ does not indicate a complete opposition to legislation of this kind, neither is it clearly explanatory of the extent of legislative power to deal with this subject reserved to the states in the absence of congressional action. Had Marshall been able to convince one additional justice of the correctness of his position in *Ogden v. Saunders*, the states would have been deprived of the power of enacting any bankruptcy legislation, other than that abolishing imprisonment for debt.⁶ But with the holding in that case that state bankruptcy legislation in effect at the time a debt is made becomes a part of the terms of the contract and consequently cannot impair its obligation, the way was open for state action until Congress saw fit to occupy the field.⁷ The principle set forth in several of the Marshall cases, that a state bankruptcy law cannot serve to discharge one of that state's citizens from his contract with citizens of other states, unless they voluntarily become parties

⁵ Art. I, Sec. 8, cl. 4.

⁶ In some of the earlier cases and treatises a distinction is made between bankruptcy and insolvency laws. Usually, when such a distinction was made, insolvency laws were said to be those doing no more than liberating debtors from imprisonment. Cf. the opinion of Marshall, C. J., in *Sturges v. Crowninshield*, 4 Wheat. 122, 194 (1819). But this distinction was never very clearly made nor was it long repeated. Justice Story, in his *Commentaries on the Constitution of the United States* (1833), §§ 1102-1115, points out that it is not uniformly or generally followed. See *Hanover National Bank v. Moyses*, 186 U. S. 181, 184 (1902).

⁷ See *Brown v. Smart*, 145 U. S. 454, 457 (1892); *Hanover National Bank v. Moyses*, 186 U. S. 181, 187 (1902). The opinion in the latter case (p. 184) contains a survey of Congressional legislation on the subject up to the act of 1898.

to the proceedings in bankruptcy, has been several times reaffirmed.⁸

In *Sturges v. Crowninshield* Marshall had said that imprisonment for debt might be abolished without violating the contract clause.⁹ "Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation." He defends this dictum not only by reference to the humane sentiments of "the illustrious patriots who framed our Constitution" but also by making a very interesting distinction between the obligation of contract and "the remedy given by the legislature to enforce the obligation. . . . This distinction exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct."¹⁰ This distinction has been applied to a variety of statutory situations, as will be pointed out in this and in subsequent chapters. Immediately in point are the cases in which the dictum of the *Sturges* case was employed for the purpose of sustaining statutes liberating debtors from prison. In *Mason v. Haile*¹¹ a special act of the Rhode Island legislature liberating a prisoner from debtors' prison was sustained. "Such laws," said Justice Thompson, "act merely upon the remedy, and that in part only. They do not take away the entire remedy, but only so far as imprisonment forms a part of such remedy."¹² Seven years later Justice Story said, "there is no doubt that the Legislature of Ohio possessed full constitutional authority to pass laws whereby insolvent debtors should be released, or protected from arrest or imprisonment of their persons on any action for any debt or demand due by them. The right to imprison constitutes no part of the contract, and a discharge of the party from imprisonment does not impair the obligation of contract, but leaves it in full force against his property and

⁸ *Baldwin v. Hale*, 1 Wall. 223 (1864); *Gilman v. Lockwood*, 4 Wall. 409 (1867); *Brown v. Smart*, 145 U. S. 454 (1892).

⁹ 4 Wheat. 122, 200, 201 (1819).

¹⁰ *Ibid.*, p. 200.

¹¹ 12 Wheat. 370 (1827).

¹² *Ibid.*, p. 378.

effects.”¹³ The same point of view is restated by a unanimous Court nearly half a century later in Penniman’s case.¹⁴

With these cases involving bankruptcy statutes may be grouped several decisions concerning the liquidation of insolvent corporations. The Court has sustained statutes requiring that minority bond-holders give their assent or refusal to a plan for financial reorganization within a reasonable time,¹⁵ and more recently has upheld a depression era statute giving to the courts power to re-open closed banks under regulations prescribed by the state superintendent of banks and three-fourths of the creditors.¹⁶

Debtors’ Relief Legislation. If the law of the contract clause, so far as it affects bankruptcy statutes, was definitively stated in the Marshall period, the classic cases concerning legislation of the kind which the Framers wished to prevent were decided during the chief justiceship of his successor. In four cases decided between 1843 and 1861 acts attempting to aid debtors, usually mortgagors, were declared unconstitutional when given a retrospective application. Under the rule in *Ogden v. Saunders* they were valid when applied to contracts made after the law was passed. Nearly all legislation of this kind has been the product of economic depressions, and has been intended primarily to aid those who are burdened with the debts assumed in more prosperous years. Consequently, the principle that it cannot be applied retroactively has been of somewhat more consequence

¹³ *Beers v. Haughton*, 9 Peters 329, 359 (1835).

¹⁴ 103 U. S. 714 (1880). The Rhode Island statute before the Court in this case provided in section 1 that “no person shall hereafter be imprisoned, or be continued in prison, nor shall the property of any such person be attached, upon an execution issued upon a judgment obtained against a corporation of which such person is or was a stockholder.” Justice Woods said that “in modes of proceeding and forms to enforce the contract the legislature had the control, and may enlarge, limit, or alter them, provided it does not deny a remedy or so embarrass it with conditions or restrictions as seriously to impair the value of the right” (*ibid.*, p. 720).

¹⁵ *Gilfillan v. Union Canal Co.*, 109 U. S. 401 (1883). See also *Chicago Life Insurance Co. v. Needles*, 113 U. S. 574 (1885).

¹⁶ *Doty v. Love*, 295 U. S. 64 (1935). These cases are also referred to in the chapter dealing with the regulation of corporations. *Infra*, p. 153. Cf. *Ashton v. Cameron County W. I. District*, 298 U. S. 513 (1936), *infra*, p. 228.

than in the case of bankruptcy statutes which ordinarily have had less exclusive applicability to periods of depression.

The usual principle enunciated in opinions dealing with statutes passed in the aid of contract debtors is that the state may alter the remedy "provided the alteration does not impair the obligation of contract."¹⁷ This theory, as has been pointed out, amounts to saying that the change in the remedy must be a reasonable one — in the opinion of the Court. Statutes giving the mortgagor the privilege of redeeming property sold on foreclosure upon payment of the purchase price plus interest, or interest and charges, or providing that sales of such property should not be made unless one-half or, in another case, two-thirds of the appraised value of the property be bid were declared unconstitutional before 1865.¹⁸ *Gunn v. Barry*¹⁹ and *Edwards v. Kearzy*²⁰ involve legislation of a somewhat different kind. In both cases statutes, based upon newly adopted constitutional provisions, exempting homesteads from execution to satisfy contract debts were held unconstitutional when retroactively applied. Justice Swayne, who gave the opinion in both, does little to clarify the definition. He says that a state may alter the legal remedies for the enforcement of a contract, "provided the change involve no impairment of a substantial right." The concurring opinions of Justices Clifford and Hunt in the second of the cases contain statements indicating that the statutes of this kind are not necessarily invalid, even when given a retrospective application, but that the provisions of the one then in question went too far, i.e., exempted an unreasonable amount of property.²¹

In all of the cases of this kind so far considered the statute,

¹⁷ Taney, C. J., in *Bronson v. Kinzie*, 1 How. 311, 316 (1843). For early statements to much the same effect see *Holmes v. Lansing*, 3 Johns Cases (N. Y.) 73 (1802), and the concurring opinion of Justice Johnson in *Fletcher v. Peck*, 6 Cranch 87 (1810).

¹⁸ *Supra*, p. 68. See also *Barnitz v. Beverly*, 163 U. S. 118 (1896), in which a statute giving a mortgagor a right of redemption where none existed before was held unconstitutional.

¹⁹ 15 Wall. 610 (1873).

²⁰ 96 U. S. 595 (1878).

²¹ 96 U. S. 609-11.

when given a retrospective application, was held invalid. With them may be placed two cases decided much later. In *Bradley v. Lightcap*²² a statute passed after the mortgage in controversy was executed provided that if a mortgagee did not obtain a deed within five years after the period of redemption had lapsed he lost the estate as the certificate of purchase would be declared void. The Court held that, though the statute may be conceded to limit the time in which to take a deed, if it is construed as taking away the right of the mortgagee to maintain possession it impairs the contract. *Bank of Minden v. Clement*²³ held that a statute exempting from the payment of debts the proceeds of insurance policies payable to the decedent's estate violated the contract clause when applied to policies taken out before it was passed and at a time when the decedent owed certain debtors. The two opinions contain numerous citations to previous cases but no discussion adding clarity to what had previously been said.

If, in all of these cases decided before 1934, the Court held the statutes to be unconstitutional, it is also true that in a group of approximately equal size, decided during the same period, the statutes were sustained. Most of these acts are not, strictly speaking, for the purpose of giving relief to debtors, but they do regulate the debtor-creditor relationship, and as such they are indicative of the kind of legislation applying to private contracts that the Court has been willing to sustain.

In several of the cases the problem was whether the application was retrospective or prospective, whether it applied to the contract that was prior to the statute, or to some ancillary or collateral matter that was initiated subsequent to the statute. An Illinois statute restricting the purchaser of mortgaged property to eight per cent interest in case of redemption was sustained, although the statute in effect when the mortgage contract was made allowed ten per cent.²⁴ The change made by the

²² 195 U. S. 1 (1904).

²³ 256 U. S. 126 (1921).

²⁴ Connecticut Mutual Life Insurance Co. v. Cushman, 108 U. S. 51 (1883).

statute did not affect the mortgage and consequently did not impair the contract. It applied only to the relief of the mortgagor in his relation with his judgment creditors. Since this relationship came into existence after the law was enacted, it was entered upon subject to that statute. The same principle is reaffirmed in a later case involving a California statute altering the rate of interest to be paid upon the redemption of mortgage property and extending the time within which redemption could take place.²⁵ A Minnesota statute providing that whenever the property of a debtor is seized by an attachment or execution against him, he may make an assignment of his property for the equal benefit of all of his creditors was sustained so far as it was applied to contracts made after its passage.²⁶

In another group of cases, however, statutes affecting the debtor-creditor relationship are upheld, although they are applied so as to affect contracts previously made. The repeal of the usury law by Texas in 1870 was held to apply in the case of a contract made before that repeal, at a time when the rate of interest agreed upon in the contract was illegal.²⁷ The privilege of avoiding a contract for usury is one that belongs to the remedy, and forms no element in the rights that inhere in the contract.²⁸ In several cases the Court has sustained the retrospective application of statutes affecting contracts on the ground that the material rights of the parties were not violated but that only remedial or incidental changes were made and that adequate

²⁵ *Hooker v. Burr*, 194 U. S. 415 (1904). Justice Peckham said that "the purchaser must found his rights upon the law as it existed when he purchased. An alteration after he had purchased, to his prejudice would be a different thing. . . . We agree that the law existing when a mortgage is made enters into, and becomes a part of, the contract; but that contract has nothing to do, so far as this question is concerned, with the contract of a purchaser at a foreclosure sale, having no other connection with the mortgage than that of a purchase at such sale" (*ibid.*, p. 420).

²⁶ *Denny v. Bennett*, 128 U. S. 489 (1888).

²⁷ *Ewell v. Daggs*, 108 U. S. 143 (1883).

²⁸ "The right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains *in fieri*, and not realized, by having passed into a completed transaction, may by a subsequent statute be taken away" (*ibid.*, p. 150).

time was given in which to comply with the statutory changes. A statute of Louisiana providing that tacit mortgages and privileges shall cease to have effect against third persons unless recorded within a stated length of time was upheld on the ground that it was in the nature of a statute of limitations, that a reasonable length of time had been left for compliance, and that it provided a reasonable and desirable protection of innocent persons.²⁹ Similar in point of view is a case sustaining a Maine statute requiring a mortgagee within three months after the completion of foreclosure to record an affidavit setting forth certain facts.³⁰ The statute was here applied to a previously made contract, but the Court held the change to be a reasonable one, easily complied with, and therefore within the power of the state over remedies.³¹ And in *Wilson v. Iseminger*³² a Pennsylvania statute presuming a release of ground rent on which there has been no payment or demand for payment for twenty-one years was held to be constitutional even as applied to previous contracts. The statute gave three years within which to preserve rights, and the Court found the regulation to be one of "convenience and policy, the result of a necessary regard to the peace and security of society."³³ A case decided in the previous year upon the principle that a change in the remedy, not substantially altering the rights of the mortgagee, is valid had to do with an amendment to a mechanic's lien law.³⁴ Under the law existing at the time the mortgage was made a mechanic's lien was given priority; this was subsequently made somewhat more effective by a statute directing the Court, at its discretion, to sell the land and improvements together and distribute the proceeds,

²⁹ *Vance v. Vance*, 108 U. S. 514 (1883).

³⁰ *Conly v. Barton*, 260 U. S. 677 (1923).

³¹ "It is recognized that the legislature may modify or change existing remedies, or prescribe new modes of procedure, without impairing the obligation of contracts, if a substantial or efficacious remedy remains or is given by means of which a party can enforce his rights under the contract" (*ibid.*, p. 681).

³² 185 U. S. 55 (1902).

³³ *Ibid.*, p. 61. The theory of this remedial act is that upon which all statutes of limitation are based (*ibid.*, pp. 60-1).

³⁴ *Red River Valley Bank v. Craig*, 181 U. S. 548 (1901).

whereas under the previous lien law only the building could be sold to satisfy a claim of this kind.³⁵

The Blaisdell Case and After. In all of these cases where the retrospective application of a statute affecting contracts is upheld, the Court is very careful to say that only remedial changes, and only reasonable ones at that, have been made. But in the most famous contract case of recent times, *Home Building and Loan Association v. Blaisdell*,³⁶ the Court sustained a Minnesota statute which seemed, by the Court's own standards, to do more than alter the remedy. This act, passed in April, 1933, was a product of the depression and an attempt to prevent the wholesale loss of mortgaged premises by debtors who were at least temporarily unable to meet their obligations. It is based upon an intent very similar to the purpose of the statutes held unconstitutional by the Court in the *Bronson* and other cases of the kind. It is a debtors' relief statute authorizing the state courts, upon application from the mortgagor, to extend the existing one-year period of redemption from foreclosure sales for such period as the courts may deem equitable, but not beyond May 1, 1935. The act was to remain in effect "only during the continuance of the emergency and in no event beyond May 1, 1935." During the additional period in which the mortgagor is allowed to maintain possession he is required to apply the income or reasonable rental value, as fixed by the courts, to the payment of taxes, interest, insurance, and the mortgage indebtedness. It is obviously a carefully drafted statute, one which at-

³⁵ "The difference between that statute and its predecessors, so far as relates to the point in question here, has special reference to the remedy only and to the manner of executing the provisions of the statute in force at the time of the execution of the mortgage and also when the work was done and the materials furnished" (*ibid.*, p. 553).

³⁶ 290 U. S. 398 (1934). This case has probably been the subject of more written comment than any other contract case except the *Dartmouth College* case. A note on it will be found in many of the law reviews. The following very incomplete list of such notes may be of some value; 18 *Minnesota Law Rev.*, 319-41, 354-55 (1934); 47 *Harvard Law Rev.*, 660-68 (1934); 32 *Michigan Law Rev.*, 545-47 (1934); 13 *Oregon Law Rev.*, 156-60 (1934); 1 *Univ. of Chicago Law Rev.*, 639-42 (1934); 12 *Texas Law Rev.*, 352-54 (1934); 9 *Indiana Law Journal*, 464-66 (1934); 9 *Wisconsin Law Rev.*, 306-08 (1934). See also Samuel Zelkovich, "Mortgage Moratorium," 28 *Illinois Law Rev.*, 830 (1934).

tempts to protect the interests of the creditor as well as those of the debtor. But it is just as obviously one which is to be applied retrospectively to the end of altering the provisions of contracts already in existence. Chief Justice Hughes does not attempt to deny that it affects more than the remedy. Rather does he justify it as a reasonable exercise of the reserved power of the state. All contracts must be made subject to the future exercise of the regulatory power of the state.³⁷ The legislature always retains the power to legislate in the interests of the public health, morals, and safety.³⁸ If the legislation is "addressed to a legitimate end and the measures taken are reasonable and appropriate to that end," it matters not whether contracts are affected incidentally, indirectly, or directly.³⁹ The power of the state may not be so exercised as to destroy the constitutional limitation, but conditions may arise "in which a temporary restraint of enforcement may be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the state to protect the vital interests of the community."⁴⁰ The Chief Justice relies heavily upon the Emergency Rent cases⁴¹ to support the contention that in times of acute economic distress the police power of the state may be constitutionally employed to prevent "the immediate and literal enforcement of contractual obliga-

³⁷ "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while, — a government which retains adequate authority to secure the peace and good order of society." 290 U. S. 398, 435.

³⁸ For a discussion of the development and application of this doctrine see ch. VIII, *infra*.

³⁹ 290 U. S. at 438.

⁴⁰ *Ibid.*, p. 439.

⁴¹ *Block v. Hirsh*, 256 U. S. 135 (1921); *Brown Holding Co. v. Feldman*, 256 U. S. 170 (1921); *Levy Leasing Co. v. Siegel*, 258 U. S. 242 (1922). In the first of these only a Congressional act was involved and hence the contract clause was not discussed. In the second and third the Court sustained the New York Emergency Housing Laws on the ground that contracts are made subject to the reserved police power of the states. 256 U. S. at 198; 258 U. S. at 249. In neither opinion is there a satisfactory discussion of the point involved.

tions by a temporary and conditional restraint." As Justice Sutherland points out in his learned and vigorous dissenting opinion, the legislation of the years preceding 1787, which led to the adoption of the contract clause, was emergency legislation, as was that of the early eighteen-forties which resulted in the decisions discussed above.⁴² "It legitimately cannot be urged that conditions which produced the rule may now be invoked to destroy it."⁴³ Indeed, it seems quite clear that the historical argument of the minority is not and cannot fully be answered, save by reference to principles not discussed in the Bronson case and those following it. The majority is unquestionably influenced by the care with which the Minnesota statute safeguards the rights of the creditor, and by the nature of the process to be employed in order to make the law apply in particular cases. Unlike the statutes considered in the previous century this one is not automatic or self-operating. It leaves much to the discretion of the state courts, and it is easier for the Supreme Court to believe that such a statute is a "reasonable" exercise of the police or regulatory powers of the state than one which was unconditional in its effect, or which did not secure to the mortgagee the rental value of the property during the extended period.⁴⁴

At the time the Blaisdell decision was frequently heralded as having "a significance much broader than that referable to its immediate effect upon moratory legislation." It "marks the climax of a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare."⁴⁵ In order to justify their conclusion the majority is really "rationalizing a constitutional limitation to subserve what it deems the requirements of an increasingly complex economic structure."⁴⁶ Thus the de-

⁴² 290 U. S. at 453 *et seq.* This dissent was concurred in by Justices Van Devanter, McReynolds, and Butler.

⁴³ *Ibid.*, p. 472.

⁴⁵ Note in 47 *Harvard Law Rev.*, 660 at 668 (1934).

⁴⁶ And rationalizing it so as to completely subvert its original meaning, "... for while the preservation of a venerable code as a living rule of conduct requires

⁴⁴ *Ibid.*, p. 432.

cision seems to justify the application of the adjective "revolutionizing" if one considers merely the original meaning of the contract clause and the purpose for which it was inserted into the Constitution. But taken in connection with other decisions of the Court in interpreting and qualifying the prohibition contained in that clause, it appears as merely another step, and not necessarily a long one, in the change of that prohibition from an absolute one to a reasonable one. Whether it was after all anything more than a rather striking application of the familiar doctrine that state legislatures may enact laws reasonably modifying the remedy may perhaps better be ascertained after an examination of subsequent decisions purporting to clarify the holding in the Minnesota case.

In a decision following shortly after the Minnesota case the Court elaborated its position in relation to the contract clause. This was *W. B. Worthen Company v. Thomas*,⁴⁷ in which an Arkansas statute exempting the benefit payments on life, sickness, and accident insurance policies from legal process for the satisfaction of any indebtedness existing at the time of the passage of the act was held unconstitutional. Before the law became effective, the plaintiff company had garnished payments to a beneficiary by an insurance company and had thus acquired a lien under Arkansas law. The statute had been upheld by the state Supreme Court, but was declared invalid by the United States Supreme Court as impairing the obligation of contracts.

Chief Justice Hughes, for the Court, held that the Arkansas legislation, unlike the Minnesota statute, made no attempt to

some growth and adaptation, the evolution of a doctrine to the point where it deserts the very roots of its inception is a far more significant matter" (*ibid.*).

"If, then, precedent, history, and logic are true guide posts of the law, the Minnesota statute was unconstitutional, unless, *Ex parte Milligan* and *Wilson v. New* to the contrary notwithstanding, an emergency operates to generate new governmental powers. This possibility would of course have been anathema to the authors of Article I, section 10, who fatuously, as it at present appears, supposed that they had forever banned stay laws from the legislative repertoire. Yet the only deduction which can be drawn from the instant case is that an emergency actually does have that effect" (*Zelkovich*, in 28 *Illinois Law Rev.* at 835).

⁴⁷ 292 U. S. 426 (1934).

discriminate on the basis of need on the part of debtors or classes of debtors and made no attempt to limit the sacrifice of contract rights. Distinguishing the *Blaisdell* case, Hughes said:

We held that when the exercise of the reserved power of the State, in order to meet public need because of a pressing public disaster, relates to the enforcement of existing contracts, that action must be limited by reasonable conditions appropriate to the emergency. . . . Accordingly, in the case of *Blaisdell*, we sustained the Minnesota mortgage moratorium law in the light of the temporary and conditional relief which the legislation granted. . . . In the instant case, the relief sought to be afforded is neither temporary nor conditional. In placing insurance moneys beyond the reach of existing creditors, the act contains no limitations as to time, amount, circumstances, or need.⁴⁸

The constitutional prohibition cannot be so construed as to prevent "limited and temporary interpositions" with respect to contracts even though the public need is produced by economic causes. But it is also to be remembered that "this essential reserved power of the State must be construed in harmony with the fair intent of the constitutional limitation."⁴⁹ Hence, while the Minnesota statute had been sustained "in the light of the temporary and conditional relief" which was granted, the relief here was unconditional and unreasonable, and hence unconstitutional.

Justice Sutherland, speaking for himself and Justices Butler, Van Devanter, and McReynolds, concurred "unreservedly" in the opinion of the Court and did so separately only because he found no substantial difference between this case and the *Blaisdell* case. "On the contrary," said he, "we are of opinion that the two statutes are governed by the same principles and the differences found to exist are without significance, so far as the question of constitutionality is concerned."⁵⁰ Obviously relishing what he considers the retreat of the majority from the *Blaisdell* doctrine, Sutherland continues, "We were unable then, as

⁴⁸ 292 U. S. 426, at 433, 434.

⁴⁹ *Ibid.*, p. 433.

⁵⁰ *Ibid.*, p. 434.

we are now, to concur in the view that an emergency can ever justify, or, what is really the same thing, can ever furnish an occasion for justifying, a nullification of the constitutional restriction.”⁵¹ Such a view takes us “beyond the fixed and secure boundaries of the fundamental law into a precarious fringe of extraconstitutional territory in which no real boundaries exist.”⁵² It is “unsound and dangerous doctrine” that the validity of such statutes depends on the length of time they are to continue. “We do not possess the benevolent power to compare and contrast infringements of the Constitution and condemn them when they are long-lived or great, or unqualified, and condone them when they are temporary or small or conditioned.”⁵³

In 1935 another case from Arkansas came to the Supreme Court, involving questions which again led to a discussion of the Blaisdell case.⁵⁴ The statute concerned was one dealing with improvement district bonds and modifying the procedure relative to defaulted obligations. In addition to reducing the interest and penalties on unpaid benefit assessments, it prolonged the minimum time within which property might be sold for their non-payment from 65 days to two and one-half years and provided a further four-year period of redemption during which the landowner might remain in possession without payment of any kind.

The constitutionality of the law was defended on the grounds of emergency declared in the act itself, and because it purported to act merely upon the remedy and not upon the substance of the contract. The Supreme Court of the United States held the statute unconstitutional. Justice Cardozo, for the Court, remarked that while the dividing line between change of substance and change of remedy is obscure, “not even changes of remedy may be pressed so far as to cut down the security of the mortgage without moderation or reason or in the spirit of oppression. Even where the public welfare is involved these bounds

⁵¹ 292 U. S. 426, at 434-35.

⁵² *Ibid.*, p. 435.

⁵³ *Idem.* See the note on this case in 21 *St. Louis Law Rev.* (1935), 84.

⁵⁴ *W. B. Worthen Co. v. Kavanaugh*, 295 U. S. 56 (1935).

must be respected.”⁵⁵ He referred to *Worthen v. Thomas*, in which the Blaisdell case had been distinguished.

“With studied indifference to the interests of the mortgagee or to his appropriate protection” the framers of the acts in question here “have taken from the mortgage the quality of an acceptable investment for a rational investor.”⁵⁶ Refuting arguments based on the Blaisdell case, Justice Cardozo pointed out the conditional nature of the relief and the discretion left to the courts by the Minnesota statute, as well as the limited duration of the statute and its provisions for the protection of the mortgagee. “None of these restrictions, nor anything approaching them, is present in this case. . . . Not Blaisdell’s Case, but *Worthen*’s supplies the applicable rule.”⁵⁷

At the same term the Court held unconstitutional the Frazier-Lemke Act.⁵⁸ Although this was an act of Congress, the Court took occasion to review its recent decisions under the contract clause, since in them it had “held unconstitutional provisions in some respects comparable to the Frazier-Lemke Act.”⁵⁹ The federal legislation was a farm mortgage moratorium act providing for a five-year stay of all proceedings if a plan for deferring payments could not be agreed upon. In the course of the opinion declaring this law void, Justice Brandeis cited the Minnesota case and *Worthen v. Kavanaugh*, saying that statutes for the relief of mortgagors are sustained when they are found “to preserve substantially the right of the mortgagee to obtain, through application of the security, payment of the indebtedness.” The same statutes are invalid when it appears that this substantive right has been materially abridged. The Minnesota case was further distinguished because it expressly limited the emergency period and even provided for further limitation at the discretion of the court.⁶⁰ This decision is of particular interest

⁵⁵ 295 U. S. 56, at 60.

⁵⁶ *Ibid.*, at 60.

⁵⁷ *Ibid.*, at 63.

⁵⁸ *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555 (1935).

⁵⁹ *Ibid.*, at 578. An amended version of this act was sustained by a unanimous Court in *Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke*, 300 U. S. 440 (1937).

⁶⁰ *Ibid.*, at 581.

to the student of constitutional history because of the light that it sheds upon the expansion of the meaning of due process of law. It seems reasonably clear that in 1789 no one would have connected the prohibitions of the due process clause with legislation of this kind. On the other hand similar legislation, when enacted by the states, was believed to have been prohibited by the contract clause. There is no clause prohibiting the Congress from passing a law impairing the obligation of contracts. In the Federal Convention a motion to include such a limitation was made by Gerry on September 14, but his motion died for want of a second.⁶¹ Evidently the obligation of contracts clause is now almost, if not quite, superfluous.

The next year, 1936, another state statute was declared unconstitutional and the *Blaisdell* case further distinguished. This was *Treigle v. Acme Homestead Association*,⁶² involving legislation of Louisiana. The plaintiff became a member stockholder of the defendant building and loan association under a general Louisiana law authorizing such corporations. The law provided for withdrawal of members and established a fund for payment to be made in order of notice of intent to withdraw. The plaintiff placed his name on the list, but before he was paid, the statute in question was passed and payment refused. This statute abolished the liquidation fund and changed the order of withdrawal, so that payment of twenty-five per cent of the claim at the head of the list was made, the claimant's name then to be placed at the bottom of the list as to the balance. The United States Supreme Court held the statute unconstitutional as depriving the plaintiff of property without due process of law and impairing the obligation of contracts, and a rehearing was subsequently denied.⁶³

The state Supreme Court had recognized the impairment of the plaintiff's contract, but had upheld the law on the grounds that (1) building and loan associations are "quasi-public" institutions and may be regulated in the public interest, and (2) due

⁶¹ Farrand, *Records*, II, 619. *Supra*, p. 9.

⁶² 297 U. S. 189 (1936).

⁶³ 297 U. S. 728 (1936).

to the existing economic emergency the statute was justifiable as an exercise of the police power even though it impaired existing contracts. The United States Supreme Court held that the act did not purport to deal with an emergency and thus could not be upheld on that ground. Legislation may not interfere with purely private rights on the pretext of public necessity. "Though the obligation of contracts must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper exertion of the power, it must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive."⁶⁴ The Court reaffirmed the general doctrine of the *Blaisdell* case, but refused to consider this as emergency legislation. It might, said the Court, take judicial notice of the emergency, but it would not read into the statute a limited duration neither expressed nor implied therein.

One other case remains in which the *Blaisdell* decision was mentioned. This was *Richmond Mortgage and Loan Corporation v. Wachovia Bank and Trust Company*,⁶⁵ involving a statute of North Carolina. This act provided that when a mortgagee purchases property at his own sale conducted under power of sale, and then brings action for deficiency, the debtor may in defence show that the true value of the property exceeded the sale price and thus defeat the deficiency claim in whole or in part. In this case the plaintiff challenged the statute on the ground that it so affected the remedy as materially to impair the obligation. The state court upheld the statute, and was affirmed by the United States Supreme Court on the ground that the statute did not so circumscribe or deny existing remedies as seriously to impair the contractual right.

The Minnesota case was not directly relied upon, since the state Supreme Court had held this not to be emergency legislation. The decision was reached under the familiar doctrine of the distinction between obligation and remedy, and also on the

⁶⁴ 297 U. S. 189, at 197.

⁶⁵ 300 U. S. 124 (1937).

ground that the mortgagee still had the alternative remedy of equitable foreclosure. Justice Roberts, for the Court, cited the Minnesota case, *Worthen v. Kavanaugh*, and cases there referred to, and remarked: "The particular remedy existing at the date of the contract may be altogether abrogated if another equally effective for the enforcement of the obligation remains, or is substituted for the one taken away."⁶⁶

In view of the subsequent decisions more strictly applying the doctrine of the *Blaisdell* case, it is somewhat difficult to decide precisely what that holding means today. Some tentative conclusions, however, seem justifiable:

1. Since not every debtor needs or deserves relief, the statute must attempt to discriminate on the basis of need on the part of debtors or classes of debtors. The relief should not extend to those whose default is due to other causes, and not directly to the emergency.

2. If the emergency doctrine is to be regarded as justification, the statute probably must be limited in duration to the emergency period and preferably would leave even further discretion to the courts as to the duration of the emergency.

3. Thus the courts should be entrusted with the entire proceedings, and should have wide discretion in the suspension of obligations. "Unconditional" relief is apparently viewed with disfavor.

4. Interference with contracts must be "limited and temporary," and must not exceed that necessitated by the emergency. If justified by the police power, it must be for an end which is "in fact public" and the means must be reasonable and not "arbitrary or oppressive."

5. Statutes preventing the misuse of land or the misapplication of funds and providing substantial compensation to the

⁶⁶ 300 U. S. 124, at 128-29. See the note on this case in 35 *Michigan Law Rev.*, 1003 (1937). With these decisions cf. *U. S. Mortgage Co. v. Matthews*, 293 U. S. 232 (1934). Here the mortgagor agreed to foreclosure and sale in accordance with existing statutory regulations "or any amendments or additions thereto." This was held to justify a subsequent statute providing that during the emergency such remedy should not be available to holders of less than 25 per cent of the entire unpaid mortgage debt.

creditor for his patience — such as the rent provisions in the Minnesota statute — may be more successful in running the judicial gauntlet.⁶⁷

The Blaisdell case, in the light of subsequent decisions, appears now to have decided merely the very narrow question of the validity of the particular statute under the specific circumstances there existing. So far as any general rule may be said to have emerged, it is merely an apparently limited extension of the principle that reasonable modification of the remedy, especially if adequate time is left for compliance, does not constitute an impairment of the obligation of contracts. If any advance has been made, it consists in that economic conditions may create an emergency in which a scrupulously drafted statute may call upon the police power to grant wide discretion to courts in extending temporary and conditional relief to debtors.

Perhaps all that can be said is that the Court's interpretation of the contract clause is but another example of the apparent tendency for the courts in the practice of judicial review of legislation to demand that statutes, regardless of the provision upon which they are based, must accord with what appears to the Court to be reasonable. This, it is feared, cannot be much of a guide to legislators. And yet it must be thus so long as the Court continues to use reasonableness as the criterion of constitutionality. For reasonableness is an elusive standard which obstinately refuses to be reduced to neat and workable rules. To the legislator is left the privilege of attempting to decide what is reasonable and proper until he is enlightened by the Court.

Land Titles. Since the time of *Fletcher v. Peck*⁶⁸ there has been no doubt about the applicability of the contract clause to grants of land made by the state to one or more persons. But

⁶⁷ Cf. the opinion of Brandeis, J., in *Wright v. Vinton Branch*, 300 U. S. 440 (1937). Since this case, like the *Louisville Joint Stock Land Bank* case, *supra*, p. 115, involves a Congressional statute the contract clause was not before the Court. Nevertheless, the discussion of the allowable limits to relief given by bankruptcy statutes is highly relevant to the present problem, although it is in terms of the due process clause of the Fifth Amendment.

⁶⁸ 6 Cranch 87 (1810).

if a state may not revoke its grant of land, its power to legislate concerning the title to lands sold or otherwise granted by it does not cease with the act of alienation. In one of the cases decided toward the end of Marshall's chief justiceship, the Court unanimously supported the doctrine that where a grant or patent contains no covenant to do any further act in relation to the land, none will be created by implication.⁶⁹ It remains within the power of the state to pass recording acts and acts of limitations.⁷⁰ If such an act render void a deed or title given by a claimant to the land it is nevertheless not an unconstitutional impairment of contract. Of course, if the statute under the guise of a remedial change actually impairs the validly acquired title of one of the parties, the Court will not sustain it. In *Green v. Biddle*⁷¹ an act providing that an adverse possessor of land should be recompensed for improvements and that no suit could be brought against him for rents and profits accruing during the period while he was unaware of an outstanding title was held invalid on the ground that it materially altered the right of the landowner.

In *Satterlee v. Matthewson*⁷² the Court sustained an act of Pennsylvania providing that the landlord-tenant relation should exist between Connecticut settlers and Pennsylvania claimants. This rule reversed a decision of the Supreme Court of the state, creating a contract where none had existed according to that decision. With the wisdom of the measure, the Supreme Court refused to be concerned. It contented itself with declaring that "it is not easy to perceive how a law which gives validity to a void contract can be said to impair the obligation of that con-

⁶⁹ *Jackson v. Lamphire*, 3 Pet. 280 (1830).

⁷⁰ See *Wilson v. Standefer*, 184 U. S. 399 (1902), in which was involved an act authorizing the forfeiture of land, for failure to pay interest charges, without judicial proceedings, although the act under which the land had been purchased from the state required such proceedings. The Court held this to be a valid change in the remedy; the previous act did not constitute a contract that the proceedings there provided would be the only ones resorted to. See also *Lessee of Livingston v. Moore*, 7 Pet. 469 (1833).

⁷¹ 8 Wheat. 1 (1823). Here the "contract" considered by the Court was between the states of Kentucky and Virginia. *Supra*, p. 47.

⁷² 2 Pet. 380 (1829).

tract.”⁷³ An act validating ineffective grants of land by married women where some irregularity in the conveyance existed was held to be no impairment of contract in *Watson v. Mercer*.⁷⁴ In an opinion sustaining a statute imposing the duty of notification to prior owners before a purchaser at a tax sale could take title Justice Miller said that such a statute is not invalid simply because it is retrospective or because it affects the value of a contract.⁷⁵ “The vast disproportion between the value of the land and the sum for which it is usually bid off at such sales,” and the fact that the owner is frequently not aware of the proceedings, made “the requirement an eminently just and proper one.”⁷⁶

It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by state and national legislation. For such legislation demanded by the public good, however it may retroact on contracts previously made, and enhance the cost and difficulty of performance, or diminish the value of such performance to the other party, there is no restraint in the Federal Constitution, so long as the obligation of performance remains in full force.⁷⁷

Wills and Estates. The cases on this subject under the contract clause have been few in number and of limited scope. In *Florentine v. Barton* ⁷⁸ a special act regulating the administration of an intestate's estate and providing for the public sale of the real estate for the payment of debts was sustained. This act, said Justice Grier, does not transgress upon the domain of the courts, but is remedial legislation. It infringes no contracts. It is a plain case of useful remedial regulation. A statute authorizing the chancellor of the state to alter the trustees named in

⁷³ *Ibid.*, p. 412.

⁷⁴ 8 Pet. 88 (1834). So far as the act “has any legal operation, it goes to confirm and not to impair the contract of the *femes covert*. It gives the very effect to their acts and contracts which they intended to give, and which from mistake or accident, has not been effected” (*ibid.*, p. 111).

⁷⁵ *Curtis v. Whitney*, 13 Wall. 68 (1872).

⁷⁶ *Ibid.*, p. 71.

⁷⁷ *Ibid.*

⁷⁸ 2 Wall. 210 (1865).

a will, with the consent of those trustees, impairs no contract.⁷⁹ Neither contract nor vested right was infringed. An existing statute requiring the property of minors to be held as security may be changed so that the guardian is empowered to dispose of that property and substitute other security.⁸⁰ The legislature entered into no contract to refrain from using its power to determine the manner in which the estates of infants shall be preserved. Consequently it has the power of "altering the law on the subject, whenever in its judgment the interest of the minors or the public good requires that it should be done."

Legal Relations of Husband and Wife. In the Dartmouth College opinion Marshall said that the contract clause "never has been understood to restrict the general right of the legislature to legislate on the subject of divorces. Those acts enable some tribunal, not to impair a marriage contract, but to liberate one of the parties because it has been broken by the other."⁸¹ Justice Story said that a statute dissolving a valid marriage contract, "without any default or assent of the parties," may be as well included within the prohibition as any other interferences with a contract.⁸² But he also concedes that the legislature is not forbidden by the clause to legislate on the subject. Whether one agrees with the rationalization of this position set forth by Marshall, and, on the whole, accepted by Story, it is at least clear that the Court has not yet declared a statute providing for divorces to be unconstitutional as an impairment of contract. Sixty years after the Dartmouth College case Chief Justice Waite quoted the dictum of Marshall as a completely adequate answer to the contention that a Louisiana divorce statute was for this reason unconstitutional.⁸³ This ruling was again upheld a few years later in *Maynard v. Hill*.⁸⁴

⁷⁹ *Williamson v. Suydam*, 6 Wall. 723 (1868).

⁸⁰ *Lobrano v. Nelligan*, 9 Wall. 295 (1870).

⁸¹ 4 Wheat. 518, 629 (1819).

⁸² *Ibid.*, pp. 695-96.

⁸³ *Hunt v. Hunt*, 24 Lawyers ed. 1109 (1879). The statute here considered provided for the granting of divorces under certain conditions by a court of competent jurisdiction.

⁸⁴ 125 U. S. 190 (1888).

Only a few statutes having to do with the property rights of husband and wife have come before the Court under the contract clause, and these have been held to be valid exertions of the state's power to regulate the terms of the institution of marriage. A Tennessee statute provided that the interest of a husband in the real estate of his wife, whether acquired before or after marriage, could not be sold, or disposed of by any judgment against him. This was objected to by a creditor on the ground that, so far as it was applied to debts incurred by the husband before the passage of the statute, it impaired the obligation of contract, since it deprived the husband and creditors of vested rights in the wife's property. But the Court held that the right of the husband, prior to the enactment of the statute, did not come from contract between him and his wife, or between him and the state.⁸⁵ It came from a rule of law established by the legislature, and resting "upon public considerations arising out of the marriage relation. The relation of husband and wife is, therefore, formed subject to the power of the state to control and regulate both that relation and the property rights directly connected with it, by such legislation as does not violate those fundamental principles which have been established for the protection of private and personal rights against illegal interference."⁸⁶ A statute of the Minnesota territory making valid a past conveyance by husband and wife, ineffective when made because it deprived the wife of dower rights, was sustained in *Randall v. Krieger*,⁸⁷ as being a curative statute and impairing no contract. A Washington statute providing that one-half of the community property should be subject to the testamentary disposition of the wife altered the legal situation of couples who had married at a time when the state law gave to the husband the entire management and control of such property and specified that upon the death of husband and wife the whole of the community property should go to the survivor.

⁸⁵ *Baker's Executors v. Kilgore*, 145 U. S. 487 (1892).

⁸⁶ *Ibid.*, pp. 490-91.

⁸⁷ 23 Wall. 137 (1875). The Court relied upon *Satterlee v. Matthewson*, 2 Pet. 380 (1829), and *Watson v. Mercer*, 8 Pet. 110 (1834).

However, the retrospective application of the statute was upheld on the ground that the wife had an interest in the property as well as the husband, although the power of disposition was in the husband, and the state was within its rights in regulating the power of testamentary disposition of the property.⁸⁸

Civil War and Reconstruction Legislation. The group of cases here to be considered has two unique characteristics: all of them grew out of legislation enacted during or immediately after the Civil War and having relation only to the peculiar circumstances of that period; all of them resulted in verdicts of unconstitutionality. Two of them involved Confederate acts sequestrating moneys owing by residents of the Confederacy to loyal citizens of the Union. In both cases the acts were held unconstitutional as impairments of contracts.⁸⁹ The Constitution does not prohibit the Confederacy from impairing the obligation of contracts, but this was not a constitutional government. Whatever effect the laws in question had came from their being enforced by states, and the states are prohibited from enforcing, as well as enacting, laws interfering with contracts. The debts that were owed to citizens of the northern states at the outbreak of the war continued to be binding obligations.

In three cases decided in 1872 the Court held invalid provisions found in the reconstruction constitutions of three southern states. In the first case it ruled against a Georgia provision which declared that no state court could take jurisdiction of any contract the consideration for which was a slave.⁹⁰ The Court held that Georgia was a state of the Union in 1868, when the new state constitution was adopted, as it had been since 1789. It further held that a denial of all remedies is equivalent to a direct invalidation of a contract. In this opinion the Court appeared to assume that if the contract was valid when made it could not constitutionally be set aside later because of the

⁸⁸ Warburton v. White, 176 U. S. 484 (1900).

⁸⁹ Williams v. Bruffy, 96 U. S. 176 (1878); Stevens v. Griffith, 111 U. S. 48 (1884).

⁹⁰ White v. Hart, 13 Wall. 646 (1872).

abolition of slavery. This assumption was articulated in *Osborn v. Nicholson*,⁹¹ decided immediately afterward. This involved an Arkansas constitutional provision directly annulling all contracts for the purchase and sale of slaves. The Court said, "Whatever we may think of the institution of slavery . . . as the obligation here in question was valid when executed, sitting as a court of justice, we have no choice but to give it effect. We cannot regard it as differing in its legal efficacy from any other unexecuted contract to pay money made upon a sufficient consideration at the same time and place."⁹² In another case decided a few months later the Court held unconstitutional a section of the Louisiana constitution rendering invalid contracts for which consideration was Confederate money, again on the ground that a contract valid when made could not thus be constitutionally impaired.⁹³

In *Thorington v. Smith*⁹⁴ the Court ruled that a contract for the payment of Confederate notes made during the Rebellion could be enforced in the courts of the United States. Since this currency, which had been forced on the community by a usurping government, is no longer in circulation, "the party entitled to be paid in these Confederate dollars can recover their actual value at the time and place of the contract, in lawful money of the United States."⁹⁵ The reason for this altered basis of payment was, of course, the great depreciation in value of the Confederate notes during the later part of the war. The Court refused to allow the southern states, after the war, to alter its rule for the payment of such contracts. A North Carolina statute of 1868 was applied by a state court to mean that the basis for paying a contract for the sale of wood in 1864 should be the actual value of the wood at that time, without reference to the value of the Confederate currency in which the debt was originally payable. This the Court held to be an impairment of the

⁹¹ 13 Wall. 654 (1872).

⁹² *Ibid.*, p. 664.

⁹³ *Delmas v. Merchants Mutual Ins. Co.*, 14 Wall. 661 (1872).

⁹⁴ 8 Wall. 1 (1869).

⁹⁵ *Ibid.*, p. 14.

contract.⁹⁶ A Virginia statute of similar effect was held unconstitutional in another case decided ten years later.⁹⁷ Where the contract is payable in currency, it is clear that such currency is demandable. Since the currency here involved is no longer legal, the exchange value of that currency in lawful money of the United States must be paid in order to fulfil the terms of the contract.

⁹⁶ *Wilmington etc. R.R. Co. v. King*, 91 U. S. 3 (1875).

⁹⁷ *Effinger v. Kenney*, 115 U. S. 566 (1885).

CHAPTER VI

THE REGULATION OF CORPORATIONS

MUCH the largest and most important group of cases under the contract clause is that having to do with the regulation of corporate enterprise. Some of these cases grow out of ordinary contracts between corporations already in existence and state or local governments. A few involve contracts between two or more corporations or between a corporation and an individual person. But by far the greater number involve rights, privileges, immunities, or duties contained, or supposed to be contained, in the charter of incorporation. Nearly all of the corporation cases, that is to say, follow from the rule of the Dartmouth College decision,¹ that a corporate charter is a contract between the state and the corporation. In that case the corporation was established for educational, not commercial purposes, but the same rule was assumed to apply to commercial charters by Marshall in *Providence Bank v. Billings*,² although not until 1845 was there a case of this kind in which a statute was declared unconstitutional.³

Since the Dartmouth College case there have been but six cases involving the regulation of educational or charitable corporations,⁴ but there have been a great many involving commercial corporations. A large proportion of these concern tax exemptions, and these will be dealt with in the next chapter. Excluding the tax cases but including those having to do with charitable or educational corporations, there have been nearly two hundred cases before the Supreme Court in which the regu-

¹ 4 Wheat. 518 (1819).

² 4 Peters 514 (1830).

³ *Gordon v. Appeal Tax Court*, 3 How. 133 (1845). This involves the problem of tax exemption of a bank. The first case involving regulation of a commercial corporation in which a decision of unconstitutionality was reached is *Planters' Bank v. Sharp*, 6 How. 301 (1848).

⁴ This figure does not include the tax cases which are dealt with in ch. VII.

lation of corporations has been dealt with under the clause forbidding the impairment of the obligations of contract. This series of cases represents an incomplete but a fairly representative picture of the regulation of corporations in this country during the nineteenth century. Until well into the second decade of the twentieth century there continued to be many contract cases dealing with this problem, but it is also true that after the eighteen-nineties an ever-increasing proportion of the legal controversies over such regulatory activities of the states has been considered under the due process clause. So numerous and so varied have been the statutes against which the protection of the contract clause has been invoked that it seems desirable, before considering the kinds of regulation found in them, to survey briefly the types of corporation which, at successive stages of our history, have been the subject of such regulation.

KINDS OF CORPORATIONS AFFECTED

The legislative enactments most frequently in litigation under the contract clause are those involving railroads and street railways. In all there have been seventy-three cases of this kind, twenty-four of them involving street railways. There were only two before the Civil War,⁵ and only eleven before 1880, but after that time there was a steady stream of such cases until 1920. Since then there have been only six. The first street railway case came in 1869,⁶ the second not until 1897,⁷ but since 1900 these cases have been more numerous than those involving railroads. Furthermore, of the seventeen cases in which statutes or ordinances involving rail transportation have been declared unconstitutional, nine have had to do with street railways.

Second as a source of such litigation are acts involving water companies. The first of the twenty-six cases of this kind came in 1884,⁸ the largest group, twelve, between 1900 and 1910.

⁵ The first was *Baltimore & Susquehanna R.R. v. Nesbit & Goodwin*, 10 How. 395 (1851).

⁶ *Peoples R.R. v. Memphis R.R.*, 10 Wall. 38 (1869).

⁷ *City Ry. Co. v. Citizens' St. R.R. Co.*, 166 U. S. 557 (1897).

⁸ *Spring Valley Works v. Schottler*, 110 U. S. 347 (1884).

Seven cases have resulted in a verdict of unconstitutionality. The next largest group involves a closely related public utility, the gas and electric companies. The sixteen cases in this group, like most of those concerning street railways and water companies, have to do largely with municipal ordinances rather than state statutes. There is one case as early as 1869,⁹ but, as one would expect, two-thirds of the cases have been decided since 1900. Five of the sixteen acts involved have been held unconstitutional.

A very large proportion of the cases involving banks arose over questions of taxation, and they will be discussed in the next chapter. There have been twelve non-tax cases, all except three being decided between 1841 and 1880. In six cases, three of them in the Taney period, there was a verdict of unconstitutionality.

In ten cases between 1885 and 1913 the regulation of insurance companies was involved. All of these statutes were sustained. Charitable corporations have been concerned in seven cases, the earliest a church,¹⁰ the next four colleges,¹¹ the others a benevolent association¹² and a hospital.¹³ In the first three cases the decision was that the law was unconstitutional; since 1852 all of the legislation concerned has been sustained.

There have been six cases involving telephone companies, all except one¹⁴ since 1908 and all except one¹⁵ resulting in decisions of constitutionality, and six cases spread between Taney's first term¹⁶ and 1920¹⁷ dealing with bridges, with again one

⁹ *Memphis v. Dean*, 8 Wall. 64 (1869).

¹⁰ *Terrett v. Taylor*, 9 Cranch 43 (1815). I am including this under the contract cases because the Court has so frequently done so. Justice Story in his opinion did not refer directly to the contract clause.

¹¹ *Dartmouth College v. Woodward*, 4 Wheat. 518 (1819); *Vincennes University v. Ind.*, 14 How. 268 (1852); *Pennsylvania College Cases*, 13 Wall. 190 (1872); *Bryan v. Board of Education*, 151 U. S. 639 (1894).

¹² *National Council of Junior Order v. State Council of Virginia*, 203 U. S. 151 (1906).

¹³ *Contributors to the Pa. Hosp. v. Philadelphia*, 245 U. S. 20 (1917).

¹⁴ *New York v. Squire*, 145 U. S. 175 (1892).

¹⁵ *Louisville v. Cumberland Tel. & Tel. Co.*, 224 U. S. 649 (1912).

¹⁶ *Charles River Bridge v. Warren Bridge*, 11 Peters 420 (1837).

¹⁷ *Internat. Bridge Co. v. New York*, 254 U. S. 126 (1920).

decision unfavorable to the legislation involved.¹⁸ There is an even wider spread in the five canal regulation cases, the first decided in 1834,¹⁹ the most recent in 1923,²⁰ the latter case and the one preceding it²¹ resulting in decisions of unconstitutionality. The four relatively early turnpike cases were all decided favorably to the legislation, as were the four more recent water power cases. On the other hand, in the two cases involving building and loan associations the decision went against the states. Finally there have been sixteen cases concerning a variety of enterprises — a dam, a levee, a brewery, a fertilizer factory, a lottery, a mortgage corporation, a slaughterhouse, a river improvement corporation, a glue factory, a packing house, oil and pipe line companies and motor carriers — which have produced no decisions of unconstitutionality.

TYPES OF REGULATION

It is much less easy to classify the kinds of regulation found in the many statutes and ordinances considered by the Court under the contract clause. All possible schemes involve a certain amount of artificiality and none can avoid some duplication. The method here employed is based upon the attempt to present a picture of the various kinds of regulation employed by the states and reviewed by the Supreme Court under the contract clause, rather than the legal rules developed by the Court in these decisions. In the final part of this chapter these cases will be considered again, there from the point of view of the legal categories employed by the Court rather than the content of the statutes or other instruments of regulation.

Formation of Corporation. An original act of incorporation raises no problem of the impairment of contract, but the formation of a new corporation through the consolidation of existing corporations does present several problems, some of which will

¹⁸ *The Binghampton Bridge*, 3 Wall. 51 (1866).

¹⁹ *Mumma v. Potomac Co.*, 8 Peters 281 (1834).

²⁰ *Columbia Ry., Gas & Electric Co. v. South Carolina*, 261 U. S. 236 (1923).

²¹ *Carondelet Canal & Navigation Co. v. Louisiana*, 233 U. S. 362 (1914).

be discussed in the chapter on taxation.²² The general ruling has been that where such consolidation takes place the new corporation does not take all of the powers of the old ones unless this is so stated in the new act or charter. Furthermore the new corporation is formed subject to the laws in existence at the time of its formation.²³

Authorizing a Corporation to do a Different Kind of Business from that Designated in the Charter. So long as the policy holders are protected a state may permit an insurance company to enlarge the scope of its business from a purely mutual, assessment basis to the writing of other types of insurance on a reserve basis.²⁴ Here, the Court held, there was no violation of the contracts made between the state and the companies, or between the companies and the members under the earlier plan.

Authorizing Change in Location of Corporation. In two cases the Court sustained acts empowering colleges to move to a new location.²⁵ The corporations concerned consented, indeed requested the change, in both instances, and the Court had no difficulty in finding that in the first case the state had reserved the right to amend the charter, and in the second that, although local citizens had given funds to the college in order to secure its establishment in that town, there was no contract provision requiring the location in any particular place.

Affecting Control of the Corporation. The standard case on this point is of course *Dartmouth College v. Woodward*.²⁶ It seems clear from the doctrine there set forth that any attempt by the state to take control of a corporation from the group selected as provided in the charter and vest it in another will be held invalid. If, however, the state has reserved the right

²² See *infra*, p. 190.

²³ *Shields v. Ohio*, 95 U. S. 319 (1877). See *People ex rel. Schurz v. Cook*, 148 U. S. 397 (1893), and *Grand Rapids & Ind. Ry. Co. v. Osborn*, 193 U. S. 17 (1904), in which the Court sustained statutes affecting purchasers of mortgaged railroads under acts granting them the right to incorporate.

²⁴ *Wright v. Minnesota Mutual Life Ins. Co.*, 193 U. S. 657 (1904); *Polk v. Mutual Reserve Fund Life Ass'n of New York*, 207 U. S. 310 (1907).

²⁵ *Pennsylvania College Cases*, 13 Wall. 190 (1872); *Bryan v. Board of Education*, 151 U. S. 639 (1894).

²⁶ 4 Wheat. 518 (1819).

to amend charters it may at least alter the method of electing the directors. If one may judge by the dicta of Justice Clifford and Justice Gray in the two cases²⁷ sustaining this position there are limits to the power to exercise the reserved right. It must be used, they say, for a purpose which will not defeat or substantially impair the object of the grant or the rights vested under the grant.

The Use of the Public Streets. The rapid development of the public utilities which must of necessity make some use of the public streets for their tracks or pipes or wires has produced a series of cases involving the extent to which a state or a city is constitutionally entitled to alter or amend provisions applying to the right of the utility to use the street, or provisions imposing some obligation upon those already doing so. With very rare exceptions the Court has sustained regulations of this kind. There seems to be little doubt but that the methods prescribed for securing permission to lay pipes or wires under the streets may be altered after franchises are granted, provided there is no evidence of discrimination or unfairness. Thus, to give a single example, an electrical corporation was refused permission to lay wires until it secured permission from a board established by statute after it was incorporated. The regulations of this board differed from those set forth in the statutes existing at the time of its organization.²⁸ On the other hand, the Court declared unconstitutional a regulation under which a corporation was denied the right to lay any more mains under the streets.²⁹ Here the corporation was chartered under a constitutional provision giving it the rights denied under an ordinance enacted to carry out a subsequent constitutional provision.

²⁷ *Miller v. State*, 15 Wall. 478 (1873); *Looker v. Maynard*, 179 U. S. 46 (1900). In the first case Justices Bradley and Field dissented. They argued that the agreement as to the make-up of the board of directors was not part of the charter, and therefore that the reservation of power to amend did not apply.

²⁸ *People of the State of New York ex rel. N. Y. Electric Lines Co. v. Squire*, 145 U. S. 175 (1892). In accord: *Missouri ex rel. Laclede Gas Light Co. v. Murphy*, 170 U. S. 78 (1898); *Hardin-Wyandot Lighting Co. v. Village of Upper Sandusky*, 251 U. S. 173 (1919).

²⁹ *Russell v. Sebastian*, 233 U. S. 195 (1914).

Two cases involving the validity of fees for continued use of the streets have turned upon the continued existence of the franchise grant. In the first the Court found that the grant had expired in 1910 as set forth in the original franchise, and that an ordinance of 1906 purporting to extend it to 1921 did not constitute a contract.³⁰ In the second it found that such a fee could not be charged since the charter grant of 1889 was of unlimited duration and the state constitutional provision then in effect limited such grants to fifty years, a term that had not yet expired.³¹

The Court has sustained orders requiring railroads to eliminate grade crossings within cities at their own expense.³² It has by a process of strict construction found that the cities in question had reserved powers necessary to enable them to prohibit the operation of locomotives on certain streets.³³ By similar methods of reasoning it has sustained acts requiring railways to pay the cost of paving between and just outside the tracks.³⁴

In most of the cases where the right to use the public streets has been repealed the Court has been able to find that the franchise right had expired and had not been extended,³⁵ or has announced that in doubtful cases the construction favorable to the public should be followed,³⁶ or has relied upon the principle that contracts are subject to reasonable regulations for the public safety.³⁷ In two cases, however, it has found the municipal

³⁰ *Detroit United Ry. v. City of Detroit*, 229 U. S. 39 (1913).

³¹ *Boise Artesian Hot & Cold Water Co. v. Boise*, 230 U. S. 84 (1913).

³² *N. Y. and N. Eng. R.R. Co. v. Bristol*, 151 U. S. 556 (1894); *Erie R.R. Co. v. Public Utility Comm.*, 254 U. S. 394 (1921). In the latter case Chief Justice White, Justice Van Devanter, and Justice McReynolds dissented.

³³ *R.R. Co. v. Richmond*, 96 U. S. 521 (1878); *Southern Pacific Co. v. Portland*, 227 U. S. 559 (1913).

³⁴ *Southern Wisconsin Ry. Co. v. Madison*, 240 U. S. 457 (1916); *Milwaukee Electric Ry. and Light Co. v. Wisconsin*, 252 U. S. 100 (1920); *Ft. Smith Light & Traction Co. v. Bd. of Improvement*, 274 U. S. 387 (1927).

³⁵ *Mitchell v. Dakota Central Tel. Co.*, 246 U. S. 396 (1918); *Bankers Trust Co. v. Raton*, 258 U. S. 328 (1922).

³⁶ *St. Paul Gas Light Co. v. St. Paul*, 181 U. S. 142 (1901); *Louisiana Ry. & Nav. Co. v. Behrman*, 235 U. S. 164 (1914).

³⁷ *Denver & Rio Grande R.R. Co. v. Denver*, 250 U. S. 241 (1919). Here the railroad had been directed to remove a track from the intersection of two streets.

regulation to be contrary to the contract clause. In one case the city of Louisville attempted to withdraw a franchise from a telephone company which, under ordinances of 1900 and 1902, had expressly been given the powers of a predecessor company which in turn had been given a perpetual franchise.³⁸ The Court found that the franchise had been constitutionally granted and that it could not be validly revoked. A year later the Court, in a less open case of contract violation, rejected the attempt of South Bend to prevent a railroad from completing a double track authorized by an ordinance amending the franchise almost half a century before.³⁹ Part of the double track had been built much earlier, and the city now wished to have no more of the street covered with tracks. The majority of the Court held that the right here granted to the railroad was a proper subject of contract and the contract was not thus to be revoked.

Rate Regulation. There have been many cases involving one of the most frequently litigated of governmental powers, that of regulating the rates or charges of public utility corporations. It has been suggested that the contract clause was potentially a due process clause, capable of the vast expansion which has made that provision of the Constitution the basis of so many examples of restrictive judicial action. The greatest turning point in the contract clause's limitation was *Ogden v. Saunders*,⁴⁰ but another critical point, one which has contributed in very significant measure to the breadth of the due process blanket, is to be found in a group of rate regulation cases decided in 1886. Three earlier rate cases, *Shields v. Ohio*,⁴¹ *Peik v. Chicago & N. W. Ry. Co.*⁴² and *Spring Valley Water Works v. Schottler*,⁴³ turned upon a process of interpretation which found that the state had in each instance reserved the power to

³⁸ *Louisville v. Cumberland Tel. & Tel. Co.*, 224 U. S. 649 (1912).

³⁹ *Grand Trunk Western Ry. v. South Bend*, 227 U. S. 544 (1913). Justices Hughes and Pitney dissented.

⁴⁰ *Supra*, p. 50.

⁴¹ 95 U. S. 319 (1877).

⁴² 94 U. S. 164 (1877).

⁴³ 110 U. S. 347 (1884).

fix rates.⁴⁴ The charters before the Court in the Railroad Commission cases of 1886⁴⁵ gave to the railroads the power to fix reasonable rates.⁴⁶ A subsequent statute providing that rates be fixed by a commission was sustained by the Court. Chief Justice Waite said that although the roads could fix reasonable rates, the charters did not take from the state the power to determine what shall be reasonable. "The right to fix reasonable charges has been granted, but the power of declaring what shall be deemed reasonable has not been surrendered. If there had been an intention of surrendering this power, it would have been easy to say so. Not having said so the conclusive presumption is that there is no such intention."⁴⁷ The Chief Justice is evidently anxious to avoid holding that a railroad charter is granted subject to the reserved power of the state to regulate rates. It is indeed an extreme instance of interpretation favorable to the state, for, as Justice Harlan points out in his dissenting opinion, the companies are by this reasoning placed in exactly the same position as if the rate provision were left out of the charters, or as if the state expressly reserved the regulatory power.

The forces engaged in a sustained and powerful drive during

⁴⁴ In the first case Justices Strong and Field dissented; in the second Justice Field dissented. In both dissents, but especially in the latter, lurks the fear that the rate fixed will not compensate for the investment made. The majority left that question open and concerned itself with the power of the state to deal with rates.

⁴⁵ *Stone v. Farmers' Trust Co.*, 116 U. S. 307 (1886); *Stone v. Illinois Central R.R. Co.*, 116 U. S. 347 (1886). See also *Stone v. New Orleans and Northeastern R.R. Co.*, 116 U. S. 352 (1886).

⁴⁶ In *Stone v. Illinois Central R.R. Co.*, 116 U. S. 347 (1886), the charter provision which was before the Court read, "The president and directors be, and they are hereby, authorized to adopt and establish such a tariff of charges for the transportation of persons and property as they may think proper, and the same to alter and change at pleasure."

⁴⁷ 116 U. S. 307, at 330. The commerce and due process clauses were also involved. Although the Chief Justice does not consider at length in this opinion the possibilities latent in the due process clause it is highly significant that he says that "it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation." In brief this decision which makes clear the inadequacy of the contract clause for the protection of the railroads marks a step toward the broad interpretation of the due process clause.

the eighties to restrict the regulatory activities of state legislatures could, if this attitude on the part of the Court continued, get little aid or comfort from the contract clause. Evidently they must continue to attempt to secure a reversal of the declaration in the Granger cases to the effect that the reasonableness of rates fixed by the states was to be determined by the legislatures, not by the Courts, under the sanction of the due process clause.⁴⁸ That they must continue to place little reliance upon the contract clause is further illustrated by *Georgia Railroad and Banking Co. v. Smith*,⁴⁹ in which a unanimous Court sustained the Georgia Commission in fixing a rate lower than the maximum rate set in the charter. Here Justice Field spoke for the Court. However, only two years later, in the *Minnesota Railroad Commission* case⁵⁰ the Court found that although there was no charter exemption against the fixing of rates by the state the company was deprived of property without due process of law because the statute denied the right of a judicial investigation of the reasonableness of the rates fixed. The doctrine of the Granger cases had now been reversed, and from this time on most of the struggles over rate regulation are dealt with under due process, not under the contract clause.

The few remaining railroad rate cases do not require separate treatment. In all of them the Court sustained the statute,⁵¹ even though it was sometimes necessary to employ a method of interpretation seemingly inconsistent with some of the decisions in which the regulation of street railway rates is involved. Just

⁴⁸ "The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge . . . is implied. . . . We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by Legislatures the people must resort to the polls, not to the courts." Chief Justice Waite, in *Munn v. Illinois*, 94 U. S. 113 (1877).

⁴⁹ 128 U. S. 174 (1888).

⁵⁰ *Chicago, Milwaukee, & St. Paul Ry. v. Minnesota*, 134 U. S. 418 (1890).

⁵¹ See *St. Louis & San Francisco Ry. Co. v. Gill*, 156 U. S. 649 (1895); and *Grand Rapids & Indiana Ry. Co. v. Osborn*, 193 U. S. 17 (1904), in which the Court finds that by consolidation previously existing rate privileges have been lost. In *L. & N. R.R. Co. v. Ky.*, 183 U. S. 503 (1902), it is not difficult for the Court to find that a contract limiting the rate-making power did not exist.

why the difference in attitude it is difficult to say, but it is at least apparent that, although the Court has never held a railroad rate statute unconstitutional under the contract clause, it has held void almost every municipal ordinance providing for the regulation of street railway rates brought before it under that clause. In *Detroit v. Detroit Citizens' Street Ry. Co.*⁵² the city attempted to secure a reduction in rates from the five-cent maximum fixed in the charter. The Court refused to sustain the action of the city even though the state constitution reserved the right to alter or repeal, and the franchise grants reserved to the city the power to make further rules, orders, or regulations. Justice Peckham's opinion is, considered alone, carefully reasoned, but placed beside the railroad rate cases just discussed it seems to be based upon a different set of premises. For although it may have been the intent of the framers of the state constitution to have its reservation provision apply only to state action, as Justice Peckham asserted, that is not so stated in the document itself. And if the reserved powers of the city apply only to incidental and not to "vital portions of the agreement" it is only because the Court so found.

In a series of cases⁵³ decided during the next two decades the Court makes it clear that the contract clause serves to protect the five-cent fare if any reasonably clear agreement by the city to stipulate for such a rate can be shown. Almost the sole exception is *San Antonio Traction Co. v. Altgelt*.⁵⁴ Here the Court found that a state constitutional provision reserving the power to control all franchises granted by the legislature "or created under its authority . . . [and] subject to the control thereof" gave to the state, although on the authority of the Detroit case it certainly would not have given to the city, the power to require the issuance of half-fare tickets for school children.

⁵² 184 U. S. 368 (1902).

⁵³ *Cleveland v. Cleveland City Ry. Co.*, 194 U. S. 517 (1904); *Cleveland v. Cleveland Electric Ry. Co.*, 194 U. S. 538 (1904); *Minneapolis v. Minneapolis St. Ry. Co.*, 215 U. S. 417 (1910); *Detroit United Ry. v. Michigan*, 242 U. S. 238 (1916); *Detroit United Ry. v. Detroit*, 248 U. S. 429 (1919); *Georgia Ry. & Power Co. v. Decatur*, 262 U. S. 432 (1923).

⁵⁴ 200 U. S. 304 (1906).

In other words, it seems accurate to say that in the street railway fare cases the Court has construed franchise provisions strictly as against the grantors. Probably the explanation is to be found in the definiteness of the "five-cent fare" provision. That is, after all, more difficult to get around than the usual railroad rate provision, but not much more so than the wording of the charters involved in the Railroad Commission cases of 1886.⁵⁵ It is probably relevant to point out that the first street railway cases were decided by the Court after it had begun to restrict the rate regulatory power under the due process clause, while the first railroad rate cases were decided before that time. Even where the due process clause was not invoked in the street railway cases, the due process point of view seems to have been applied.

Aside from the street railway cases just one other case has been found in which the Court ruled against an attempt to alter the existing rates of a public utility. In this case there was a clear stipulation for maximum rates to be charged by a water company to private customers, and the attempt by the city to have these lowered failed.⁵⁶ In three other cases involving water companies the Court found that no clear contract existed⁵⁷ or that there was a sufficient reservation of state power.⁵⁸ An alleged contract to supply water power at certain rates was denied in *King Manufacturing Co. v. Augusta*.⁵⁹ An ordinance fixing rates for gas was held subject to alteration in *Cedar Rapids Gas Light Co. v. Cedar Rapids*,⁶⁰ both because it was not a binding contract (although it also renewed the franchise of the

⁵⁵ See also *Northern Ohio Traction & Light Co. v. Ohio*, 245 U. S. 574 (1918), in which the attempt to force a reduction of rates from an interurban railway upon pain of losing the franchise failed. A divided Court held that the circumstances of the original grant indicated no intention either to give or to accept a mere revocable grant.

⁵⁶ *Vicksburg v. Vicksburg Waterworks Co.*, 206 U. S. 496 (1907).

⁵⁷ *Knoxville Water Co. v. Knoxville*, 189 U. S. 434 (1903); *Owensboro v. Owensboro Waterworks Co.*, 191 U. S. 358 (1903).

⁵⁸ *Murray v. Pocatello*, 226 U. S. 318 (1912). See also *Stanislaus v. San Joaquin & King's River Canal & Irrigation Co.*, 192 U. S. 201 (1904).

⁵⁹ 277 U. S. 100 (1928).

⁶⁰ 223 U. S. 655 (1915).

company) and because of a state statute prohibiting cities from contracting away rate-making powers. In another case involving the regulation of telephone rates the Court found no impairment of contract because the original contract was, so far as its rate provisions were concerned, invalid, the state not having given to the city power to fix rates by contract.⁶¹ A statute making certain pipe lines common carriers and subjecting their rates to state regulation was held not to violate the contract clause, at least for those pipe lines which had previously been serving as common carriers.⁶² Unusual in that the objection to the fixing of rates was here on the part of those having to pay them is *Sands v. Manistee River Improvement Co.*⁶³ This company was allowed to charge tolls from those benefiting from its work in removing obstacles to the floating of timber on a river. Reliance was placed by the plaintiff upon a provision of the Ordinance of 1787, but the Court held that this ceased to be operative after the formation of the states in the area involved, excepting as the states accepted its provisions.

Other Forms of Regulation Affecting Freedom of Corporations to Manage Their Own Affairs. Although the regulation of rates has been the most widely applicable form of state interference with corporate self-government, there has been a variety of other kinds of regulation, some of them of even greater importance to particular corporations than those requiring lower rates. With the exception of an early case in which the Court refused to allow Mississippi to forbid the transfer or assignment of banknotes,⁶⁴ and of a very recent case in which Louisi-

⁶¹ Home Tel. & Tel. Co. v. Los Angeles, 211 U. S. 265 (1908).

⁶² Producers Trans. Co. v. R.R. Comm. of California, 251 U. S. 228 (1920). The attempt to convert those pipe lines which had been serving as private contract carriers into common carriers was held invalid under the due process clause. But as to those which had previously served as common carriers the company was held to be incapable of preventing state regulation of their rates by making contracts for future transportation.

⁶³ 123 U. S. 288 (1887); also Ruggles v. Manistee River Improvement Co. 123 U. S. 297 (1887).

⁶⁴ Planters' Bank v. Sharp, 6 How. 301 (1848). Justice Daniel and Chief Justice Taney dissented on the ground that there was no express grant of this power to the bank.

ana was denied the power to alter the method of paying withdrawing members of building and loan associations,⁶⁵ the Court has sustained the various forms of regulation here grouped together, in nearly all of them, unanimously. A number of them turned upon the interpretation of the contract involved. In cases involving requirements that trains stop at a certain station, previously abandoned with the consent of the state,⁶⁶ prohibiting a railroad from buying a parallel and competing line,⁶⁷ and refusing to allow a benevolent association to grant charters,⁶⁸ the Court found no contract to exist. A curious example of construction favorable to the power to regulate is found in *Pearsall v. Great Northern Railway Co.*⁶⁹ Here a general power to consolidate granted in the charter was successfully limited by a subsequent act prohibiting consolidation with a parallel and competing road. The power had not been executed, and the Court apparently felt that this particular limitation upon the general grant was justified, at least in part, by that fact. Justice Brown has a good deal to say about monopolies and competition, however, and although he admits the constitutionality of exclusive grants, it would seem that the basis of the decision is much more the point of view of the Sherman Act than that of decisions on monopolistic grants under the contract clause. When the city of New York forbade advertising on trucks or busses, the Fifth Avenue Coach Company unsuccessfully contended that the enforcement of the ordinance would be a violation of its charter rights.⁷⁰ A street railway case turned upon the question whether the requirement by the public service commission that the plaintiff continue through service on

⁶⁵ *Treigle v. Acme Homestead Assn.*, 297 U. S. 189 (1936). Justice Roberts here held that the act was not a proper exercise of the police power for a public purpose, but dealt only with the private rights of stockholders.

⁶⁶ *R.R. Co. v. Hamersley*, 104 U. S. 1 (1881).

⁶⁷ *L. & N. R.R. Co. v. Ky.*, 161 U. S. 677 (1896).

⁶⁸ *National Council of Junior Order of United Amer. Mechanics v. State Council*, 203 U. S. 151 (1906).

⁶⁹ 161 U. S. 646 (1896). The opinion contains an unusually extensive review of the cases on corporate regulation under the contract clause. Justices Field and Brewer dissented without opinion.

⁷⁰ *Fifth Avenue Coach Co. v. New York*, 221 U. S. 467 (1911).

certain lines was in harmony with its franchise.⁷¹ A divided Court found that a sufficient reservation had been made in the charter.

A very interesting doctrine, to be discussed at some length below, is to be found in a number of cases in which the Court declared that the state cannot by contract divest, or, as it said in one case, "denude," itself of its police or regulatory power over some matters of vital concern to the health, morals, and safety of the community. It has, to cite a few examples, in this way found it possible to sustain a liquor law,⁷² an ordinance requiring the removal of a fertilizer factory,⁷³ the annulling of a lottery company's franchise,⁷⁴ the relocation of tanks used for the storage of petroleum,⁷⁵ subjecting insurance accounts to inspection by auditors,⁷⁶ requiring such a company to prepare a specified kind of annual statement,⁷⁷ regulating the control of banks,⁷⁸ and restricting the position of tracks and the operation of cars within the city limits.⁷⁹ Of substantially the same point of view are the opinions sustaining a New Jersey act forbidding transportation of water through pipes or canals into another state,⁸⁰ and a Texas act forbidding the use of natural gas in the manufacture of carbon black.⁸¹ A contemporary problem of government control is discussed in *Sproles v. Binford*.⁸² A statute providing a comprehensive series of regulations of motor carriers was challenged on several grounds, among them the violation of franchise contracts. We need not here consider the

⁷¹ Puget Sound Traction, Light & Power Co. v. Reynolds, 244 U. S. 574 (1915).

⁷² Beer Co. v. Massachusetts, 97 U. S. 25 (1878). The discussion of the inherent police power here is really dicta, since the Court found that by an act of 1809 the state had reserved the power to regulate.

⁷³ Fertilizing Co. v. Hyde Park, 97 U. S. 659 (1878).

⁷⁴ Stone v. Mississippi, 101 U. S. 814 (1880).

⁷⁵ Pierce Oil Corp. v. Hope, 248 U. S. 498 (1919).

⁷⁶ Chicago Life Ins. Co. v. Needles, 113 U. S. 574 (1885).

⁷⁷ Eagle Ins. Co. v. Ohio, 153 U. S. 446 (1894).

⁷⁸ Bank of Oxford v. Love, 250 U. S. 603 (1919).

⁷⁹ Atlantic Coast Line R.R. v. Goldsboro, 232 U. S. 548 (1914).

⁸⁰ Hudson County Water Co. v. McCarter, 209 U. S. 349 (1908).

⁸¹ Henderson Co. v. Thompson, 300 U. S. 258 (1937).

⁸² 286 U. S. 374 (1932).

discussion of the commerce and due process clauses, but it is worth noticing that Chief Justice Hughes dismissed the contract contention with the remark that contracts relating to the use of the highways must be deemed to have been made in contemplation of the regulatory authority of the state.⁸³

Imposing Burden upon Corporations. The Court has sustained a number of statutes and ordinances requiring that a corporation construct some addition to its plant or repair or remove some existing structure. The addition of a fishway to a dam was upheld on the ground that there is an implied obligation by common law on all dam owners to build fishways, an obligation not lifted by the grant of a charter.⁸⁴ It is interesting that the Court should have given this reason for sustaining the statute, since it also found that the state had reserved the power to amend or alter. Railroads have been required to repair viaducts,⁸⁵ lower or remove tunnels,⁸⁶ to construct new bridges over their tracks only six years after the existing ones had been authorized by city ordinance,⁸⁷ and to remove a viaduct and build double tracks across their road.⁸⁸ However, the Court held that, where a city had agreed to pay the cost of constructing crossings, the railroad could not be required by the state to share the cost of building an underpass.⁸⁹ This agreement by the city was not inconsistent with the proper exercise of the police power.

⁸³ Similarly, the Court ruled in a recent case that contracts between utilities and their customers are made subject to the continuing power of the state to annul and supersede rates previously established by contract. *Midland Realty Co. v. Kansas City Power and Light Co.*, 300 U. S. 109 (1937).

⁸⁴ *Holyoke Co. v. Lyman*, 15 Wallace 500 (1873).

⁸⁵ *Chicago, B. & Q. R.R. Co. v. Nebraska*, 170 U. S. 57 (1898); *N. Pacific Ry. Co. v. Minnesota*, 208 U. S. 583 (1908); here the inalienable police power doctrine was invoked.

⁸⁶ *West Chicago St. R.R. Co. v. Ill.*, 201 U. S. 506 (1906). Reservation in earlier statute.

⁸⁷ *Wabash R.R. v. Defiance*, 167 U. S. 88 (1897).

⁸⁸ *New Orleans Pub. Service, Inc. v. New Orleans*, 281 U. S. 682 (1930). See also *International Bridge Co. v. New York*, 254 U. S. 126 (1920), where the Court found that because of a reserved right to amend the state could require the building of a roadway on a bridge.

⁸⁹ *Mo., Kansas & Texas Ry. Co. v. Oklahoma*, 271 U. S. 303 (1926).

Imposing Legal Liability for Damage. Where the damage was caused by the negligence of the corporation, its servants or agents, the state is not prohibited by the contract clause from imposing liability upon it, even though the corporation has been exempt by its charter for liability for death of its employees for such reason.⁹⁰ This, said Justice Van Devanter for a unanimous Court, belongs to the class of subjects over which the legislature possesses regulatory but not contracting power. A railroad may also be made liable for damages by fire occasioned by its locomotives,⁹¹ or by water caused by its failure to make openings to carry off such water, and again it seems that the reserved police power of the state renders any charter provision on the subject ineffective.⁹²

Grant of Similar Franchise Rights to Another Corporation. In one of the most famous cases under the contract clause Chief Justice Taney held valid a franchise to build a bridge, soon to become a free bridge, very close to a toll bridge, the charter of which had not expired.⁹³ This decision was, of course, based upon the principle of strict construction of the franchise, not upon the principle that an exclusive bridge franchise may not be given. Indeed, the basic assumption of the Taney Court here was that if the grant had been explicitly monopolistic within the area, the later grant would be a violation of the contract clause. In the case of the Binghampton Bridge,⁹⁴ decided just two years after Taney's death, it was made abundantly clear that the Court will protect against competition a toll bridge which can show a grant of exclusive privilege. Three members of the Court, Justice Grier, Justice Field, and Chief Justice Chase, dissented, not on the ground that a monopolistic

⁹⁰ *Texas & New Orleans R.R. Co. v. Miller*, 221 U. S. 408 (1911); also *Texas & New Orleans R.R. Co. v. Gross*, 221 U. S. 417 (1911). In *Chicago & Alton R.R. Co. v. McWhirt*, 243 U. S. 422 (1917), the Court found that there was no attempt to contract away such exemption.

⁹¹ *St. Louis & San Francisco Ry. Co. v. Mathews*, 165 U. S. 1 (1897).

⁹² *Chicago & Alton Ry. v. Tranbarger*, 238 U. S. 67 (1915). See ch. VIII, below.

⁹³ *Charles River Bridge v. Warren Bridge*, 11 Peters 420 (1837), *supra*, p. 63.

⁹⁴ 3 Wallace 51 (1866).

grant is invalid, but rather because they believed that the majority had interpreted the franchise too liberally, contrary to the admitted rule of strict construction.⁹⁵

The most interesting group of cases dealing with the desire of states and cities to repent of their generosity and give to another corporation, sometimes to several others, rights previously granted away in an exclusive franchise, followed the adoption of the Louisiana constitution of 1879. Section 258 contains these words: "The monopoly features in the charter of any corporation now existing in the State, save such as may be contained in the charters of railroad companies, are hereby abolished." This was first tested in the case of *Butchers' Union Slaughterhouse Co. v. Crescent City Co.*⁹⁶ Here the company which had received the exclusive right to carry on the slaughtering business in the New Orleans area by act of 1869 was resisting the entrance of a competitor who claimed the right to establish a slaughterhouse under the constitution of 1879. The Supreme Court, in 1873, had refused to find the monopoly to be contrary to the Thirteenth or Fourteenth Amendment,⁹⁷ but it now finds that grant was invalid because it attempted to bargain away the police power.⁹⁸ This power, only very recently discovered by the Court to apply to cases under the contract clause,⁹⁹ is particularly concerned with the protection of the public health, and slaughterhouses are closely connected with the public health. Therefore, since the legislature cannot

⁹⁵ See *Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co.*, 138 U. S. 287 (1891), in which Justice Field for the Court sustained a subsequent grant on the grounds that the earlier one contained no exclusive franchise.

⁹⁶ 111 U. S. 746 (1884).

⁹⁷ *The Slaughter House Cases*, 16 Wall. 36 (1873).

⁹⁸ Justice Miller, who also wrote the opinion in the *Slaughter House* cases, is at pains to point out that the earlier case is not being overruled. Nor does he hold that exclusive grants are always invalid, "even the power to give an exclusive right for the time being to particular persons or to a corporation to provide this stock landing and to establish this slaughterhouse." What he does deny is the power of the legislature to give such a grant as will prevent future legislatures from repealing the grant or making a new one inconsistent with it, "whenever in the wisdom of such legislature, it is for the good of the public it should be done."

⁹⁹ See *infra*, pp. 199-203.

validly "devest itself of the power to enact laws for the preservation of the public health,"¹⁰⁰ it follows that a monopolistic grant, for more than "the time being," is unconstitutional and the provision in the constitution of 1879 is not contrary to the contract clause. The reasoning of the Court would be more satisfactory if the measure under consideration were one providing for the regulation of slaughterhouses rather than for the abolition of an exclusive grant. Justice Bradley, with whom Justice Harlan and Justice Woods agreed, pointed out in a concurring opinion that the monopoly clause in the act of 1869 "had nothing of the character of a police regulation."¹⁰¹ He, as well as Justice Field who wrote a separate concurring opinion, argued that the act of 1869 was invalid under the privileges and immunities, due process, and equal protection provisions of the Fourteenth Amendment, a position essentially the same as that they had taken in their dissenting opinions in the Slaughter House cases eleven years earlier. The majority of the Court, however, was but slowly coming to a slightly modified version of their position.

That the doctrine of the Butchers' Union case does not ordinarily apply to monopolistic grants to public utilities was soon made clear in other cases involving the Louisiana constitution of 1879. New Orleans attempted to grant to certain companies the privilege of supplying the city with water and gas, privileges earlier granted in exclusive franchises to other corporations. In both instances¹⁰² the Court held that a monopolistic grant is valid against later attempts to introduce competition unless the public health or morals or safety are directly involved. The grant of a monopoly to a utility is not contrary to the police power doctrine, although such enterprises always continue to be subject to regulation for the protection of the public health, morals, or safety. This same principle has been many times repeated. Unless it can be shown that the earlier exclusive fran-

¹⁰⁰ 111 U. S. 746, at 751.

¹⁰¹ *Ibid.*, p. 761.

¹⁰² *New Orleans Gas Co. v. La. Light Co.*, 115 U. S. 650 (1885); *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674 (1885).

chise has expired,¹⁰³ an attempt to grant another franchise of the same kind will be held contrary to the contract clause. This has been applied not only to bridge, to water, and to gas¹⁰⁴ companies but also to the use of streets by street railways, even where the grant was a perpetual one.¹⁰⁵ The ordinary rule of strict construction will be employed,¹⁰⁶ but if the Court finds that the grant is an exclusive one it will protect it against the attempt to introduce competition.

Construction of Own System by City. Although the Court has sometimes been more strict in its interpretation of corporate rights, it has applied the same rule of law to the construction of water or gas or electric plants by the city after the grant of a franchise for this purpose to a private corporation. Perhaps the best illustration is to be found in the Walla Walla case.¹⁰⁷ Here the city had granted to a corporation a franchise to supply water to the city for twenty-five years, and as part of the agreement stipulated not "to erect, maintain or become interested in any water works." Six years later the city passed an ordinance to provide for a municipal water works and for the issuance of bonds with which to finance it. The corporation sought and secured an injunction forbidding this action. A unanimous Court sustained the injunction, held that the contract was not void as creating a monopoly or contracting away part of the governmental power, and that the second ordinance

¹⁰³ For examples of construction resulting in this conclusion see *Turnpike Co. v. Ill.*, 96 U. S. 63 (1878); *Cleveland Electric Ry. Co. v. Cleveland & Forest City Ry. Co.*, 204 U. S. 116 (1907).

¹⁰⁴ In addition to the Louisiana case see *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683 (1885).

¹⁰⁵ *City Ry. Co. v. Citizens St. R.R. Co.*, 166 U. S. 557 (1897); *Cleveland v. Cleveland Electric Ry. Co.*, 201 U. S. 529 (1906); *Covington v. South Covington & Cincinnati St. Ry. Co.*, 246 U. S. 413 (1918).

¹⁰⁶ *Piedmont Power & Light Co. v. Graham*, 253 U. S. 193 (1920). An interesting example of such construction is found in *Stein v. Bienville Water Supply Co.*, 141 U. S. 67 (1891). Here the plaintiff had been granted the exclusive privilege for a term of years of supplying Mobile with water from a particular creek. A franchise to another water company was later issued with the privilege of supplying the city water from any other stream in the county. The Court held that this did not infringe the privileges of the first company.

¹⁰⁷ *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1 (1898).

clearly impaired the obligation of the contract. In the Vicksburg case ¹⁰⁸ the problem of interpretation was complicated by a state constitutional provision and a less clear statement in the charter, but the Court again found a violation of contract, and had no hesitancy in declaring the later act unconstitutional.¹⁰⁹

In the other cases where this situation has been involved the Court has sustained the municipality in its establishment of a municipal plant. Two cases may serve to illustrate the readiness of the Court to find that the city has not contracted away its power to establish a public plant. In *Lehigh Valley Co. v. Easton* ¹¹⁰ the corporation had received an exclusive franchise to supply the locality with water and gas for a term of years. The charter was granted under a state statute of 1874 empowering such exclusive franchises. However, it appeared that a statute of 1867 authorized towns to build and maintain public water works. When Easton decided to take advantage of the act of 1867 the Court sustained the Pennsylvania Court in its finding that the act of 1867 had not been repealed by the act of 1874 and that therefore there was no impairment of contract. The opinion does not squarely face the problem, whether the act of 1874 was an amendment of the act of 1867. Rather does it demonstrate a desire to find for the right of the town to establish a plant of its own.

The Knoxville case turns upon a narrower point.¹¹¹ In 1882 the city granted to a corporation a franchise to supply the city with water for a thirty-year period, agreeing not to grant "to any other person or corporation any contract or privilege to furnish water to the city of Knoxville." The city was given the

¹⁰⁸ *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453 (1906). See for an earlier discussion of this situation, *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65 (1902).

¹⁰⁹ Cf. *Los Angeles v. Los Angeles Gas & Electric Corp.*, 251 U. S. 32 (1919). Here the Court refused to sustain the action of the city in ordering the removal or relocation of the company's poles in order that the city might construct a street lighting system of its own. In the absence of a clearly applicable provision in the company's franchise the Court based its ruling on the due process clause.

¹¹⁰ 121 U. S. 388 (1887).

¹¹¹ *Knoxville Water Co. v. Knoxville*, 200 U. S. 22 (1906).

right, after fifteen years, to purchase the plant. In 1903, negotiations for purchase having resulted in disagreement, the city was authorized by legislative act to purchase or construct a plant of its own. This was sustained by the Court on the ground that the grantee could claim nothing by implication; the city had, to be sure, agreed not to give a franchise to any other corporation, but had not bound itself to refrain from establishing a municipal plant as it had done in the Vicksburg and Walla Walla cases. Justice Harlan who had written the Lehigh Valley opinion and dissented in the Vicksburg case wrote this opinion, as interesting an example of strict construction of a corporate grant as one can find. Justices Brown, White, Peckham, and Holmes dissented without opinion. In the other cases of this kind the Court was invariably unanimous in holding that the type of exclusive grant found in the Vicksburg and Walla Walla cases was not present and that therefore the city could not be prevented from establishing its own plant.¹¹²

Revocation of Land Grants. Three of the four cases of this kind deal with the attempt of Texas to withdraw grants made to railroads as a consideration for the construction of their lines in that state. The variety of statutory and constitutional provisions involved makes the opinions very difficult to summarize, but at least it is clear that the Court found no difficulty in holding that a state may by contract alienate its public lands and may not, consistent with the contract clause, rescind that alienation.¹¹³ To have held otherwise would have involved overruling

¹¹² *Bienville Water Supply Co. v. Mobile*, 175 U. S. 109 (1899); *Skaneateles Water Works Co. v. Skaneateles*, 184 U. S. 354 (1902); *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212 (1902); *Helena Water Works Co. v. Helena*, 195 U. S. 383 (1904); *Hamilton Gas Light & Coke Co. v. Hamilton City*, 146 U. S. 258 (1892); *Capital City Light and Fuel Co. v. Tallahassee*, 186 U. S. 401 (1902); *City of Joplin v. Southwest Missouri Light Co.*, 191 U. S. 150 (1903); *Ramapo Water Co. v. City of New York*, 236 U. S. 579 (1915). In the *Ramapo* and *Hamilton* cases the Court also found that there were reservation clauses in the state constitutions.

¹¹³ In *Davis v. Gray*, 16 Wall. 203 (1873), the grant had been made upon condition of construction of 50 miles of track by 1861 and 50 miles within two years thereafter. The Civil War intervened and an act was passed to extend the time limit for the construction for ten years after 1866. The reconstruction constitution of 1869 attempted to secure the forfeiture to the state of all such lands not

the first case under the contract clause, *Fletcher v. Peck*.¹¹⁴

But if a state may constitutionally grant away in perpetuity the land which it owns, it is not entirely free to grant away lands covered by tide waters or by the fresh waters of the Great Lakes. Such lands, said the Court in *Illinois Central Railroad v. Illinois*,¹¹⁵ the state holds in trust for the people of the state and they can make grants of such lands only for purposes of constructing wharves, docks, and other aids to commerce, and only to the extent that they "do not substantially impair the public interest in the lands and water remaining."¹¹⁶ The principle permitting limited grants for public benefit, Justice Field continued,

. . . is a very different doctrine from the one which would sanction the abdication of the general control of the state over the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property.¹¹⁷

Justice Field admits that no decision can be cited "where a grant of this kind has been held invalid,"¹¹⁸ but he adds that

alienated by the roads. The Court found that this impaired the contract with the railroads. The same holding on an even more complicated factual situation is found in *Houston & Texas Central Ry. Co. v. Texas*, 170 U. S. 243 (1898). The action of the state was sustained in *Galveston, Harrisburg & San Antonio Ry. Co. v. Texas*, 170 U. S. 226 (1898), on the ground that the road here involved was building along a different route from that specified in the original land grant act.

¹¹⁴ 6 Cranch 87 (1810).

¹¹⁵ 146 U. S. 387 (1892). The state had by act of 1869 granted to the railroad a very large area of submerged lands in front of the existing water line, subject to the conditions that the corporation could not alienate the title, obstruct the harbor, impair navigation, or obtain exemption from any act regulating the rates of wharfage or dockage. This was repealed by an act of 1873.

¹¹⁶ 146 U. S. 387, at 452.

¹¹⁷ 146 U. S. 387, 452-53.

¹¹⁸ 146 U. S. 387, 455. Some of the state cases seem definitely to contradict his point of view. See *Gough v. Bell*, 2 Zab. (N. Y.) 441 (1850); *People v. N. Y. and S. J. F. Co.*, 68 N. Y. 71 (1877).

he knows of no instance where "the harbor of a great city and its commerce have been allowed to pass into the control of any private corporation." And he finds no lack of decisions in which such lands are declared to be held by the state in trust for the public. It is significant that these are either English decisions or based upon the old common law principles of public access to the channels of commerce, not decisions under the contract clause.¹¹⁹ Justice Shiras, with whom Justices Gray and Brown concurred, dissented, arguing that "the ownership of a state in the lands underlying its navigable waters is as complete and its power to make them the subject of conveyance and grant is as full, as such ownership and power to grant in the case of the other public lands of the state."¹²⁰ He points out that the majority agrees that the state has power to make such grants, if they be in small parcels. The extent of such a grant and its effect upon public interests should therefore be left to the discretion of the legislature.¹²¹ The contract was a valid one and so long as the railroad performs its part of the bargain the state cannot impair its obligation.

Appropriating Property of Corporation. In every case where the state has attempted to take property of a corporation without compensation the Court has found its act to be invalid. In the earliest cases of this kind a church¹²² and a college¹²³ were

¹¹⁹ 146 U. S. at 457-59. It is interesting that in view of Justice Field's dissent in *Munn v. Illinois*, 94 U. S. 113 (1877), he refers to Lord Hale's doctrine of affectation with a public interest.

¹²⁰ 146 U. S. at 465. Chief Justice Fuller, having been of counsel in the court below, and Justice Blatchford, being a stockholder in the Illinois Central Railroad, took no part. The decision accordingly was by the narrow margin of four to three.

¹²¹ The right of the state to regulate such lands or harbors in the public interest, says the minority, is admitted but not here involved. It will be time to invoke this principle when the railroad disregards or obstructs this sovereign power. 146 U. S. 387, 475.

¹²² *Terrett v. Taylor*, 9 Cranch 43 (1815).

¹²³ *Vincennes Univ. v. Indiana*, 14 How. 268 (1852). The grant here had originally been made by act of Congress, and subsequently confirmed by the territorial legislature of Indiana. Chief Justice Taney, Justice Catron, and Justice Daniel dissented on the ground that the territory did not grant, and did not have the power to grant, the lands. Title remained in Indiana or in the United States.

involved. Two cases of the middle period have to do with the attempt of the state to appropriate the assets of banks.¹²⁴ Two more recent ones concern canals.¹²⁵ In all of them the principles involved are familiar though the problems of statutory construction were sometimes difficult. A different aspect of the question, taking by eminent domain, will be considered separately.¹²⁶

Foreign Corporations. The problem of foreign corporations in American constitutional law has, for the most part, been discussed on grounds other than the contract clause.¹²⁷ A few of the cases have, however, been concerned either exclusively or in part with that clause. A state may alter the regulations concerning the service of legal notices since the original requirement was not a contract but a license to do business.¹²⁸ It may require the payment of a fee before a corporation already in existence may continue to do business,¹²⁹ and it may revoke a permit to do business under a statute forbidding price fixing, at least when the statute is applicable to domestic and foreign corporations alike.¹³⁰ It may validly impose an onerous financial burden as a condition for the subsequent conduct of business in the state, but it does not follow from this that a corporation which refuses to accept the condition and chooses

¹²⁴ *Curran v. Arkansas*, 15 How. 304 (1853); *Baring v. Dabney*, 19 Wall. 1 (1874). Possibly the cases upholding the right of a state to take over inactive or unclaimed bank deposits might be mentioned as an exception. There, however, it is not the property of the bank which is being taken. Furthermore, the due process, rather than the contract clause, was the principal basis of discussion. See *Provident Institution for Savings v. Malone*, 221 U. S. 660 (1911); *Security Savings Bank v. California*, 263 U. S. 282 (1923).

¹²⁵ *Carondelet Canal & Navigation Co. v. Louisiana*, 233 U. S. 362 (1914); *Columbia Ry., Gas & Electric Co. v. South Carolina*, 261 U. S. 236 (1923).

¹²⁶ *Infra*, p. 195.

¹²⁷ G. C. Henderson, *The Position of Foreign Corporations in American Constitutional Law* (1918).

¹²⁸ *Connecticut Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602 (1899).

¹²⁹ *Diamond Glue Co. v. U. S. Glue Co.*, 187 U. S. 611 (1903).

¹³⁰ *Hammond Packing Co. v. Arkansas*, 212 U. S. 322 (1909). The Arkansas constitution contained a clause reserving the power to amend or repeal, but Justice White appeared to believe that independent of such reservation the state would have the power to make police regulations of this kind. See also *National Council v. State Council of Virginia*, 203 U. S. 151 (1906).

to discontinue its business in the state can thereby evade its existing contractual obligations.¹³¹ Interference with such contracts constitutes a violation of the contract clause.

Remedies. A very large proportion of the cases in which there has been a discussion of changes in remedies involve private contracts and were discussed in the preceding chapters. The statutes altering existing remedies and applying to corporations have been relatively few in number. In a general sense they represent attempts to apply the rule in *Bronson v. Kinzie*, "Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract."¹³² Thus in an early case upholding banking legislation the Court ruled that changing the modes of action by banks on promissory notes already executed affects only the remedy.¹³³ The implicit acceptance in this case of retrospective laws which do not impair the obligation of contracts is made explicit in a later case sustaining a statute allowing notes of a bank to be offered in payment for debts due it, though passed subsequent to the judgment, as merely recognizing the right of set-off.¹³⁴ In another case the Court upheld an alteration in the time limit for the bringing of an action on a bond given by a surety company.¹³⁵ Most of the other cases dealing with remedies have had to do with statutes providing more effective methods for enforcing shareholder's liability. In all such cases the statutes have been sustained. Creating a new remedy by allowing direct action by a judgment creditor against a shareholder, instead of proceeding by bill in equity, is allowable, since the liability of the shareholder is not thereby increased.¹³⁶ The substitution of a suit in equity by a receiver for an individual action against shareholders does not violate

¹³¹ *Bedford v. Eastern Building & Loan Assn.*, 181 U. S. 227 (1901).

¹³² 1 How. 311, 316 (1847).

¹³³ *Crawford & Files v. Branch Bank*, 7 How. 279 (1849).

¹³⁴ *Blount v. Windley*, 95 U. S. 173 (1877). "There is no constitutional inhibition against retrospective laws" (Miller, J., *ibid.*, at 180).

¹³⁵ *National Surety Co. v. Architectural Decorating Co.*, 226 U. S. 276 (1912).

¹³⁶ *Hill v. Merchants Mutual Insurance Co.*, 134 U. S. 515 (1890); *Bernheimer v. Converse*, 206 U. S. 516 (1907).

the obligation of contract,¹³⁷ nor does a statute making a bill in equity on behalf of all creditors the exclusive remedy, even when enacted after a creditor of a corporation had started a proceeding against a shareholder on an unpaid subscription.¹³⁸

Stockholders' Liability. Where an existing charter makes stockholders individually liable for a railroad's debts to the extent of their stock, a subsequent statute cannot validly release a stockholder from a debt contracted before the repeal of the liability clause.¹³⁹ Such a release would violate the "virtual" contract between the stockholders and the creditors as well as between the creditors and the corporation. On the other hand, the imposition of individual liability upon shareholders of banks by an act of 1849 was held not to be an unconstitutional impairment of the agreement contained in the articles of association adopted by the bank's incorporators, because the statutes in effect at that time (1844) gave them no power to stipulate against such liability.¹⁴⁰ Where a constitutional provision in existence at the time a contract is made contains a double liability clause, a subsequent constitutional amendment repealing this clause is valid so far as concerns a person who purchases his stock after the date of the repeal amendment.¹⁴¹

Regulating Insolvent Corporations. One of the most recent cases under the contract clause developed out of the bank failure legislation of the Great Depression.¹⁴² A Mississippi act in force in 1930 regulating the liquidation of closed banks provided that one of the assets was the personal liability of the stockholders. An act of 1935 gave to the courts power to reopen banks in accordance with plans approved by the superintendent

¹³⁷ *Henley v. Myers*, 215 U. S. 373 (1910).

¹³⁸ *Pittsburg Steel Co. v. Baltimore Equitable Society*, 226 U. S. 455 (1913). See also *Shriver v. Woodbine Savings Bank*, 285 U. S. 467 (1932); *People's Banking Co. v. Sterling*, 300 U. S. 175 (1937).

¹³⁹ *Hathorn v. Calef*, 2 Wall. 10 (1865). See also *Coombes v. Getz*, 285 U. S. 434 (1932).

¹⁴⁰ *Sherman v. Smith*, 1 Black 587 (1862). A reservation clause in the earlier act was relied upon only as a clinching argument.

¹⁴¹ *Ochiltree v. Railroad Co.*, 21 Wall. 249 (1875).

¹⁴² *Doty v. Love*, 295 U. S. 64 (1935).

of banks and three-fourths of the creditors. Both assenting and non-assenting creditors must accept payment according to its terms. The Supreme Court sustained this statute against the plea of certain non-assenting creditors on the ground that it merely changed the method of liquidation, in which no one possessed a vested right. The release of stockholders' liability in return for contribution of capital to the reopened bank impairs no contract. This decision is in accordance with earlier ones involving canal¹⁴³ and insurance¹⁴⁴ companies in which the Court had held that every corporate charter is issued subject to the implied condition that upon the abuse of privileges or failure of the corporation to fulfill its obligations the state is entitled to make reasonable regulations for its reorganization or liquidation.

Repeal of Charter or Franchise. Every corporation, said Justice Story in an early case, is subject to dissolution.¹⁴⁵ The creditors of a corporation are presumed to contract with reference to that possibility. Consequently the act of a state in securing the voluntary surrender of a charter and providing for the conveyance of the assets of that corporation to a new organization is valid. The voluntary surrender of a charter has rarely presented any problems under the contract clause. Furthermore, every case dealing with an attempt by a state to revoke a charter or franchise has resulted in a favorable verdict. The reservation of the power to repeal, whether the reservation is found in a general statute¹⁴⁶ or in the act of incorporation,¹⁴⁷ has been the usual basis for termination, although, for obvious reasons, not the basis for many cases. An uncompleted contract was relied upon in one case.¹⁴⁸ Another rested upon the failure

¹⁴³ *Gilfillan v. Union Canal Co. of Pa.*, 109 U. S. 401 (1883).

¹⁴⁴ *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574 (1885).

¹⁴⁵ *Mumma v. The Potomac Co.*, 8 Peters 281 (1834). See also *Smith v. Chesapeake & Ohio Canal Co.*, 14 Peters 45 (1840).

¹⁴⁶ *Greenwood v. Freight Co.*, 105 U. S. 13 (1882).

¹⁴⁷ *Calder v. Michigan*, 218 U. S. 591 (1910). Justice Holmes here said that a corporation, by spending money or incurring debts, cannot avoid the reserved power to repeal. "It would be a waste of words to try to make clearer than it is on its face the meaning and effect of this reservation of the power to repeal." But see *Northern Ohio Traction and Light Co. v. Ohio*, 245 U. S. 574 (1918).

¹⁴⁸ *People's R.R. v. Memphis R.R.*, 10 Wall. 38 (1869).

of a turnpike company to keep its road in repair, that is to live up to its bargain.¹⁴⁹ The failure of a corporation to exercise its rights may result in loss for non-user,¹⁵⁰ as the violation of the laws of the state may result in revocation for mis-user.¹⁵¹ In another case the Court relied upon the old doctrine of strict construction to hold that a statute forbidding the further maintenance of toll gates on a particular road violated no contract.¹⁵²

THE TECHNIQUE OF THE COURT IN CASES INVOLVING CORPORATE REGULATION

The cases under the contract clause concerning the regulation of corporations have been so numerous and the problems there represented so significant in American economic and political history that it has seemed desirable to attempt a separate analysis of the approach of the Court in cases of the kind. This necessarily involves some repetition of what has been previously said in this chapter. But it is hoped that further consideration of these cases, not from the point of view of the kinds of regulation involved but from that of the Court's methods of resolving the constitutional problems presented in the cases, will throw enough additional light upon the history of the contract clause to justify that repetition.

The Existence of a Contract. It has been pointed out that if the Court had adhered to the intentions of 1787-1788 there would have been relatively few cases in which to interpret and apply the contract clause. But in the early Marshall cases the definition of contract, so far as this clause was concerned, was enormously broadened. The Dartmouth College ruling that a charter is a contract dwarfs any subsequent interpretation of the

¹⁴⁹ Turnpike Co. v. State, 3 Wall. 210 (1866). This case is of unusual interest because it presents the problem discussed by Chief Justice Taney in his Charles River Bridge opinion — the grant of a franchise to build a railroad paralleling an established turnpike. The turnpike company here claimed that the railroad charter impaired its own charter rights, but the Court found that no exclusive privilege which could prevent the building of the railroad had been granted.

¹⁵⁰ N. Y. Electric Lines Co. v. Empire Subway Co., 235 U. S. 179 (1914).

¹⁵¹ Cosmopolitan Club v. Virginia, 208 U. S. 378 (1908).

¹⁵² Scott County Macadamized Road Co. v. Missouri, 215 U. S. 336 (1909).

clause. In the Taney period the Court said that although it will ordinarily follow the interpretation given by state courts to their own constitutions and statutes, it will not do so when contracts to which a state is party are involved. In *Piqua Branch of the State Bank v. Knoop*¹⁵³ the Court refused to follow the decision of the Ohio court as to whether a contract existed. In *Ohio Life Insurance and Trust Co. v. Debolt*,¹⁵⁴ decided at the same time, Chief Justice Taney said:

It has been contended on behalf of the defendant in error (the Treasurer of the State), that the construction given to these Acts of Assembly by the state courts ought to be regarded as conclusive. It is said that they are laws of the State, and that this Court always follows the construction given by the state courts to their own constitution and laws.

But this rule of interpretation is confined to ordinary acts of legislation, and does not extend to the contracts of the State, although they should be made in the form of a law. For it would be impossible for this court to exercise any appellate power in a case of this kind, unless it was at liberty to interpret for itself the instrument relied on as the contract between the parties.¹⁵⁵

The Court will decide for itself whether a contract exists, what are its obligations, and whether these have been impaired. Not only the original charter but also subsequent grants of rights or privileges given to existing corporations constitute contracts.¹⁵⁶ The assumption of the burdens inhering in the exercise of these privileges is sometimes called the consideration which makes a bargain out of what seems a gift and clothes it with the mantle of constitutional protection. Furthermore the contract which has been impaired need not be one between the state and the corporation, although this is ordinarily the case. The Court in several early cases found that legislation aimed at

¹⁵³ 16 How. 369 (1853).

¹⁵⁴ 16 How. 416 (1853).

¹⁵⁵ *Ibid.*, pp. 432-33. See the statement to the same effect by Justice Wayne in *Jefferson Branch Bank v. Skelly*, 1 Black 436 (1861); see also *Mobile & Ohio R. Co. v. Tennessee*, 153 U. S. 486 (1893), and cases cited at pp. 493-95; *Detroit United Ry. v. Michigan*, 242 U. S. 238 (1916).

¹⁵⁶ *City Ry. Co. v. Citizens' St. R.R. Co.*, 166 U. S. 557 (1897).

corporations impaired contracts between the state and third parties or between the corporation and third parties. These have included contracts between a bank and the maker of a note,¹⁵⁷ between a state and holders of bank notes,¹⁵⁸ between a state and a bank's creditors,¹⁵⁹ and between a corporation or its stockholders and its creditors.¹⁶⁰

In many cases the Court has found that no contract as claimed existed. Most frequently this has been done by a process of interpretation closely resembling the application of the rule of strict construction. Thus in *Bryan v. Board of Education*¹⁶¹ the Court refused to find that the removal of a college from a city whose citizens had donated funds for the purpose of establishing the institution was an impairment of contract because there had been no express stipulation that it would remain in that city. If there had been diversion of funds or change of control the situation would have been different, but in the absence of an express condition that it continue in a given locality it cannot be contended that removal is invalid. In *Scott County Macadamized Road Co. v. Missouri*¹⁶² the Court sustained the action of the state in seeking to enjoin the maintenance of toll gates. A charter of 1853 provided that "the privileges granted in this charter shall continue for fifty years, provided that the county courts . . . may at the expiration of twenty years or any time thereafter, purchase said road at the actual cost of construction and make it a free road." There was, said Justice Holmes, no contract giving any privileges to the company after the fifty-year period. A charter vesting control of a bank in its stockholders is not a contract according to which the state agrees to refrain from the enactment of additional banking regulations.¹⁶³ The claim by a manufacturing company that a city

¹⁵⁷ *Planters' Bank v. Sharp*, 6 How. 301 (1848).

¹⁵⁸ *Baltimore & Susquehanna R.R. v. Nesbit & Goodwin*, 10 How. 395 (1851).

¹⁵⁹ *Curran v. Arkansas*, 15 How. 304 (1853). See also *Baring v. Dabney*, 19 Wall. 1 (1874).

¹⁶⁰ *Hathorn v. Calef*, 2 Wall. 10 (1865).

¹⁶¹ 151 U. S. 639 (1894).

¹⁶² 215 U. S. 336 (1909).

¹⁶³ *Bank of Oxford v. Love*, 250 U. S. 603 (1919).

had entered into a perpetual contract with it to furnish water power at low rates was denied since there was no formal contract and the correspondence and conversations relied upon by the company impressed the Court as being no more than indicative of the general rate to be charged all users of power, and no guarantee that the rate would continue.¹⁶⁴

In other cases the Court has found that, although the form of a contract was present, it had never been a valid one because the city or state lacked the necessary power to contract. The limitations upon the power to contract in these instances have usually been found in state constitutions or municipal charters.¹⁶⁵

Another principle to be found in cases holding that no contract existed is that what was claimed to be a contract was not an agreement between parties but a matter of general law.¹⁶⁶ In *Pennsylvania R. R. Co. v. Miller*¹⁶⁷ it was held that exemption from liability for depreciation suffered by property next to that condemned by a railroad was a matter of general law which could be repealed without impairment of contract. Statutes providing that purchasers of mortgaged railroads at foreclosure sales might incorporate their property are subject to repeal. Until rights have vested under such statutes they are matters of general law, not contracts.¹⁶⁸ An immunity from liability for damage from surface water was held a general rule of law which would not be implied into an express contract between the state and a railroad so as to enable the lat-

¹⁶⁴ *King Mfg. Co. v. Augusta*, 277 U. S. 100 (1928). For some additional illustrations of the refusal of the Court to find a contract see *Knoxville Water Co. v. Knoxville*, 189 U. S. 434 (1903); *Underground R.R. v. New York*, 193 U. S. 476 (1904); *National Council v. State Council*, 203 U. S. 151 (1906); *Chicago & Alton R.R. Co. v. McWhirt*, 243 U. S. 422 (1917); *Sears v. Akron*, 246 U. S. 242 (1918); *Pierce Oil Corp. v. Hope*, 248 U. S. 498 (1919).

¹⁶⁵ *Bienville Water Co. v. Mobile*, 186 U. S. 212 (1902); *Home Tel. and Tel. Co. v. Los Angeles*, 211 U. S. 264 (1908); *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 223 U. S. 655 (1912).

¹⁶⁶ For an early statement of this principle see the dissenting opinion of Justice Daniel, with which Chief Justice Taney concurred, in *Planters' Bank v. Sharp*, 6 How. 301 (1848).

¹⁶⁷ 132 U. S. 75 (1889).

¹⁶⁸ *People ex rel. Schurz v. Cook*, 148 U. S. 397 (1893).

ter to insist that the rule remain unchanged for his benefit.¹⁶⁹

In certain other cases the Court has found that the alleged contract was a license and consequently repealable. Although the principal basis of the decision in *Illinois Central R. R. Co. v. Illinois*¹⁷⁰ was the inability of the state to grant away the submerged lands involved, Justice Field did suggest as an alternative ground the construction of the grant by the lower court as a mere license to act as agent of the state.¹⁷¹ In *Wabash R. R. Co. v. Defiance*¹⁷² an ordinance authorizing the railroad to erect new bridges over its tracks was a license, not a contract that the bridges would remain any particular length of time or that the city would not change its requirements concerning the level of the streets or the approaches to the bridges. In *Connecticut Mutual Life Insurance Co. v. Spratley*¹⁷³ the Court said that an act fixing the conditions of doing business in the state by a foreign corporation is a license which can be revoked at any time.¹⁷⁴

Finally there is a small but interesting group of cases in which the Court has held that unexecuted powers of authority were revocable on the ground that no rights had vested. In *Pearsall v. Great Northern Ry. Co.*¹⁷⁵ the action of Minnesota in withdrawing from a railroad the right granted in its charter to consolidate with a parallel road was sustained on this principle. After a lengthy examination of the doctrine of vested rights and an admission that essential powers granted by contract may not ordinarily be revoked without impairing the obligation of contract, Justice Brown said that:

¹⁶⁹ *Chicago & Alton R.R. v. Tranbarger*, 238 U. S. 67 (1915).

¹⁷⁰ 146 U. S. 387 (1892).

¹⁷¹ *Ibid.*, pp. 460-62.

¹⁷² 167 U. S. 88 (1897).

¹⁷³ 172 U. S. 602 (1899).

¹⁷⁴ "Statutes of this kind reflect and execute the general policy of the state upon matters of public interest, and each subsequent legislature has equal power to legislate upon the same subject. The legislature has power at any time to repeal or modify the act granting such permission, making proper provision when necessary in regard to the rights of property of the company already acquired, and protecting such rights from any illegal interference or injury" (*ibid.*, p. 621).

¹⁷⁵ 161 U. S. 646 (1896).

Where the charter authorizes the company in sweeping terms to do certain things which are unnecessary to the main object of the grant, and not directly and immediately within the contemplation of the parties thereto, the power so conferred, so long as it is unexecuted, is within the control of the legislature and may be treated as a license, and may be revoked if a possible exercise of such power is found to conflict with the interests of the public.¹⁷⁶

There is here the suggestion of a reserved police power. The same combination of ideas is found in *Adirondack Ry. Co. v. New York*,¹⁷⁷ where an unexecuted power to take land by eminent domain was held not to be so vested, even though the railroad had filed a map of its proposed route, as to render invalid the condemnation of the land by the state. And in *Ramapo Water Co. v. New York*¹⁷⁸ the action of the company in filing maps of the land to be taken (a matter of a thousand square miles of watershed was here claimed), without notice to landowners or the observance of other preliminaries, gave to it no vested right to exclude "the rest of the world" from the area. A franchise to supply a city with electricity was held revocable where it appeared that, although twelve years had passed since the grant was made, no steps had been taken to construct a plant for the purpose.¹⁷⁹ No rights had vested, for the condition upon which the privilege was attached had never been performed.

Legislative Action Required. The contract clause is a limitation upon the legislative branch of the state government.¹⁸⁰ A municipal ordinance is a law within the meaning of the clause.¹⁸¹

¹⁷⁶ 161 U. S. 673-74. Cf. *Bank of Commerce v. Tennessee*, 163 U. S. 416, 424, 425 (1896).

¹⁷⁷ 176 U. S. 335 (1900).

¹⁷⁸ 236 U. S. 579 (1915).

¹⁷⁹ *Capital City Light & Fuel Co. v. Tallahassee*, 186 U. S. 401 (1902).

¹⁸⁰ See ch. XI, *infra*.

¹⁸¹ In *King Manufacturing Co. v. Augusta*, 277 U. S. 100 (1928), Justice Brandeis wrote a dissenting opinion, concurred in by Justice Holmes, in which he argued that under the Judiciary Act of 1925 the power of the Supreme Court to review by writ of error did not include state court decisions as to the validity of municipal ordinances. This, he said, can now be done only by writ of *certiorari*. But with this view the majority had no sympathy.

In *Walla Walla v. Walla Walla Water Co.*¹⁸² the Court refused to apply the governmental-proprietary test to ordinances after argument by counsel that ordinances passed in a proprietary rôle were not legislation within the meaning of the Constitution. But there is a type of ordinance or statute which is not considered a law under the contract clause. It is the declaration that a contract is not valid, or that legal steps shall be taken to test the validity of a contract. In *St. Paul Gas Light Co. v. St. Paul*¹⁸³ the reason given was that such an ordinance created no new rights or duties antagonistic to the obligations of a contract.¹⁸⁴ But in *Cincinnati v. Cincinnati & Hamilton Traction Co.*¹⁸⁵ a majority of the Court held that an ordinance which not only denied the validity of a contract but also imposed terms upon the continuance of operations by the corporation had the effect of a law impairing the obligation of contract. And in another case decided just afterwards the same ruling was handed down in a case having to do with a declaration by a board of commissioners that an indeterminate franchise to an interurban railway had come to an end.¹⁸⁶

Strict Construction. The principle that public grants are to be construed strictly against the grantee was several times enunciated by the Marshall Court and was given a spectacular prominence by Taney in the Charles River Bridge case.¹⁸⁷ Manifestly necessary in a period of national development when legislatures were making grants which at best were overly generous, and at worst were procured by fraud and could not possibly be justified in terms of social interest, the principle could nevertheless not protect against explicit, if ill-considered, grants. It did help to confine them within the stipulated limits. Justice Field once said that this principle "serves to defeat

¹⁸² 172 U. S. 1 (1898).

¹⁸³ 181 U. S. 142 (1901).

¹⁸⁴ Reaffirmed in *Defiance Water Co. v. Defiance*, 191 U. S. 184 (1903); *Des Moines v. Des Moines City Ry. Co.*, 214 U. S. 179 (1909); *Western Union Teleg. Co. v. Georgia*, 269 U. S. 67 (1925).

¹⁸⁵ 245 U. S. 446 (1918). Justices Clarke and Brandeis dissented.

¹⁸⁶ *Northern Ohio Traction & Lt. Co. v. Ohio*, 245 U. S. 574 (1918).

¹⁸⁷ *Supra*, pp. 63-66.

any purpose concealed by the skillfulness of terms to accomplish something not apparent on the face of the Act, and thus sanctions only open dealing with legislative bodies.”¹⁸⁸

Very little has been added to the principle since 1837 so far as doctrine is concerned. As it was stated by Taney, so it has been repeated scores of times. Its meaning can only be determined pragmatically. It is necessary, that is to say, to survey the cases in which it has been applied, as well as those in which the Court has refused to find it applicable, in order to ascertain the effect that it has had upon the law of the contract clause and the course of corporate regulation.

Perhaps the most illuminating fact to be derived from a pragmatic investigation is that, without significant exception, the cases in which it has been applied have involved a public utility.¹⁸⁹ Ordinary private business (unless banks are included in that category, and then the generalization would be but slightly affected), even though much of it is carried on under charters of incorporation, has hardly ever been involved in cases where the rule of strict construction of public grants has been applied. The cases have had to do with canals, turnpikes, bridges, railroads, street railways, and with gas, water, electric, and telephone companies. Most of them have been concerned with the question of the exclusiveness of the grant, the duration of the grant, or the regulation of rates.

Strict Construction of Allegedly Exclusive Grants. In the Charles River Bridge case the Court held that an exclusive franchise had not been granted. But where a monopolistic provision is clearly present, it will be so interpreted as to grant nothing by implication.¹⁹⁰

The desire, so obvious in some of the early cases, not to construe exclusive franchise grants so that they will stifle the

¹⁸⁸ *Slidell v. Grandjean*, 111 U. S. 412, 438 (1884).

¹⁸⁹ This generalization is here applied only to the subject matter of this chapter, not to the problem of tax exemptions which is dealt with in ch. VII.

¹⁹⁰ *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116 (1864); *Richmond, Fredericksburg, and Potomac R.R. Co. v. Louisa R.R. Co.*, 13 How. 71 (1851); *Turnpike Co. v. State*, 3 Wall. 210 (1866). See also *Wheeling and Belmont Bridge Co. v. Wheeling Bridge Co.*, 138 U. S. 287 (1891).

development of railroads has frequently been applied since those cases to the construction of franchise grants to public utilities by cities, or, more rarely, by states. Indeed, as early as 1869 the Court indicated that it would read nothing by implication into a franchise issued to a public utility corporation. In *Memphis v. Dean*¹⁹¹ it said that an agreement by a city giving the exclusive privilege to a gas company of supplying the city's public lamps does not serve to prevent the city from granting a franchise to another gas company to do business in the city or from taking stock in that company. Most of the cases in which the Court sustained the action of cities in establishing their own plants in competition with private plants turned upon the construction of an allegedly monopolistic clause in the existing company's charter.¹⁹² In the *Skaneateles* case Justice Peckham, after conceding that there is an implication in every grant "that the grantor will do nothing to detract from the full and complete operation of the grant itself," proceeds to say that:

There is no implied contract in an ordinary grant of a franchise, such as this, that the grantor will never do any act by which the value of the franchise granted may be in the future reduced. Such a contract would be altogether too far reaching and important in its possible consequences in the way of limitation of the powers of a municipality, even in matters not immediately connected with water, to be left to implication.¹⁹³

In the *Joplin* case Justice McKenna stated the principle somewhat more broadly:

The limitation contended for is upon a governmental agency, and restraints upon that must not be readily implied. The appellee concedes, as we have seen, that it has no exclusive right, and yet contends for a limitation upon the city which might give it (the appellee) a practical monopoly. Others may not seek to compete with it, and if

¹⁹¹ 8 Wall. 64 (1869).

¹⁹² *Skaneateles Water Works Co. v. Skaneateles*, 184 U. S. 354 (1902); *Joplin v. Southeast Missouri Light Co.*, 191 U. S. 150 (1903); *Helena Water Works Co. v. Helena*, 195 U. S. 383 (1904); *Knoxville Water Co. v. Knoxville*, 200 U. S. 22 (1906).

¹⁹³ 184 U. S. 354, 363.

the city cannot, the city is left with a useless potentiality, while the appellee exercises and enjoys a practically exclusive right. There are presumptions, we repeat, against the granting of exclusive rights, and against limitations upon the powers of government.¹⁹⁴

And in *Knoxville Water Co. v. Knoxville*, the closest case of the lot, Justice Harlan said that the courts should adhere to "the salutary doctrine . . . that grants of special privilege affecting the general interests are to be liberally construed in favor of the public and that no public body, charged with public duties, be held, upon mere implication or presumption, to have divested itself of its powers."¹⁹⁵

Strict Construction and the Duration of Public Grants. In some of the cases involving the duration of a franchise grant very similar statements are to be found. In *Blair v. Chicago*, a case involving a street railway franchise, Justice Day is unusually realistic:

Legislative grants of this character should be in such unequivocal form of expression that the legislative mind may be distinctly impressed with their character and import, in order that the privileges may be intelligently granted or purposely withheld. It is a matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the legislature with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed.¹⁹⁶

Where an ordinance granting a franchise to a local telephone company had expired, this was held to bring an end to the franchise, although a later ordinance granted to the company the right to operate a long-distance service. "The ambiguity resulting must be resolved against the telephone company."¹⁹⁷

¹⁹⁴ 191 U. S. 150, 156, 157.

¹⁹⁵ 200 U. S. 22, 38. For cases discussing claims of exclusive privilege by a street railway and an electric power company, see *Cleveland Elec. Ry. Co. v. Cleveland & Forest City Ry. Co.*, 204 U. S. 116 (1907); *Piedmont Power & Light Co. v. Graham*, 253 U. S. 193 (1920).

¹⁹⁶ 201 U. S. 400, 471 (1906). See also *Detroit United Ry. v. Detroit*, 229 U. S. 39 (1913).

¹⁹⁷ *Mitchell v. Dakota Central Tel. Co.*, 246 U. S. 396, 412 (1918).

Strict Construction and the Regulation of Rates. The cases in which the principle of strict construction has been employed to the end of supporting the rate-making power of the states have been dealt with at some length earlier in this chapter and little need be added here to what has been said. It is evident that the Court refused to employ the contract clause as a means of liberating the railroads from rate regulation by the states, even where the charters apparently granted to the roads power to establish their own rates.¹⁹⁸ The Court has not been in the least concerned by the fact that the rate-making statutes were enacted after the grant of charters and were in that sense retrospective in character. Only where street railway charters provided for a specific rate have the legislative attempts at rate regulation been held invalid.

Some Other Examples of Strict Construction. Some miscellaneous forms of regulation sustained under the principle of strict construction may be briefly considered. The plea of a street railway required to lower or remove a tunnel under the Chicago River that this requirement was a violation of its grant from the city to construct the tunnel was rejected on the ground that the city had not, even if it could have done so, expressly stipulated that no change would be necessary in the future, nor had it agreed to bear a share of the costs of making such an alteration.¹⁹⁹ Here there is a suggestion of the idea that, even if an express stipulation had been present, the incapacity to surrender the police power would render it ineffective. This is, as is pointed out below, made very clear in *Chicago & Alton R. R. Co. v. Tranbarger*.²⁰⁰ But the Court also said in the latter case (which involved a requirement that railroads construct transverse openings in roadbeds to take care of surface water) that "an immunity from a change of the general rules of law will not ordinarily be implied as an unexpressed term of an express contract."²⁰¹ In a case concerning a municipal require-

¹⁹⁸ *Supra*, p. 134.

¹⁹⁹ *West Chicago St. Ry. Co. v. Illinois ex rel. Chicago*, 201 U. S. 506, 520-22 (1906).

²⁰⁰ 238 U. S. 67 (1915).

²⁰¹ *Ibid.*, p. 76.

ment that a railway pave between and just outside its tracks,²⁰² and in one where the ordinance required a change from one kind of pavement to another,²⁰³ the Court employed the principle of strict construction in order to find that previous charters and ordinances had not exempted the railways from these expensive improvements. The Court deemed the principle so well established by precedent that it found it unnecessary to do more than state the general principle and cite some of the leading cases in which it had been discussed.

Exceptions to the Principle of Strict Construction. Before leaving this subject, however, some mention should be made of certain cases in which the Court seemed to forget the existence of this well-settled principle and to construe grants liberally in favor of the grantee. There is no reason to believe that in them the Court was consciously whittling down the rule. Rather do they illustrate another principle—that when the Court believes that substantial justice cannot be done by adhering to one of its own rules of construction, it may ignore that rule and attempt to protect the party whose just rights are endangered.

Two early cases in which there were strong dissents on just this issue are *Planters' Bank v. Sharp*²⁰⁴ and the Binghampton Bridge case.²⁰⁵ In the first case the Court by a bare majority construed the charter of the bank as including the right to transfer bills and notes, although such a power was not expressly granted. A subsequent act taking away that power was declared invalid. Justice Daniel, dissenting, held that the right in question could not be derived from the charter but, if at all, from the general law, which is subject to modification or repeal. In the second the majority held that, when the company was given all the rights and privileges of a previous corporation, a restriction in the former charter that no other bridge be built

²⁰² *Southern Wisconsin Ry. Co. v. Madison*, 240 U. S. 457 (1916).

²⁰³ *Milwaukee Electric Ry. Co. v. Wisconsin ex rel. Milwaukee*, 252 U. S. 100 (1920).

²⁰⁴ 6 How. 301 (1848). *Supra*, p. 75.

²⁰⁵ 3 Wall. 51 (1866).

within two miles became a part of the latter charter, and that the creation of another company to construct a bridge within the prohibited distance was unconstitutional as impairing the obligation of contracts. Justice Grier, with whom Chief Justice Chase and Justice Field Concurred, argued in a dissent that the principle of the Charles River Bridge case was not being followed in that the exclusive right to operate a toll bridge along a two-mile river front was being read into the latter charter.²⁰⁶ In a case decided in 1913 the Court apparently leaned toward a generous interpretation of municipal grants in finding a grant to an electrical company to be perpetual where there was some room to doubt whether this had been either possible or intended.²⁰⁷ In *Covington v. South Covington and Cincinnati Street Ry. Co.*²⁰⁸ the majority found that a franchise was of perpetual duration although an ordinance enacted before the grant of the franchise limiting a previous grant of this sort to twenty-five years might have been held to apply. Again, the construction of the majority is not unreasonable, but it does seem to indicate an attitude of generosity toward grants to public utilities somewhat inconsistent with the usual rule of resolving doubts in favor of the public. But where a grant to a public service company empowering it to use the streets for the purpose of erecting an electric power and light system makes no mention of time the Court has been inclined to find it to be perpetual, unless there is an applicable reservation clause.²⁰⁹

Implied Conditions. In a few decisions certain implied conditions have been read into charters. These conditions serve to limit the corporate grant somewhat in the manner of strict construction of the charter, but perhaps more like clauses of reservation. This is well illustrated by *Chicago Life Insurance Co.*

²⁰⁶ Cf. the discussion of the transfer of tax exemptions, *infra*, p. 190.

²⁰⁷ *Old Colony Trust Co. v. Omaha*, 230 U. S. 100 (1913). See also *Russell v. Sebastian*, 233 U. S. 195 (1914).

²⁰⁸ 246 U. S. 413 (1918). Justices Clarke and Brandeis dissented.

²⁰⁹ *Ohio Public Service Co. v. Ohio*, 274 U. S. 12 (1927). In this case Justices Holmes and Brandeis dissented.

v. *Needles*.²¹⁰ An Illinois statute provided that the state auditor investigate the affairs of life insurance companies. A later statute authorized the auditor, upon entertaining the opinion that a company was insolvent, to apply to a court for an injunction to prevent the company from doing further business. In this case an injunction had been issued and a receiver appointed by the Court. The Supreme Court held that the statute as here applied by the state court was not an impairment of the contract made with the company in its charter. Every corporate charter contains an implied condition that, upon the abuse of privileges, the state may reclaim its grant. It is equally implied that the corporation shall be subject to reasonable regulations serving to secure the ends for which the corporation was created.²¹¹ In *New York Electric Lines Co. v. Empire City Subway Co.*²¹² the Court sustained the decision of the New York Court of Appeals which in turn had upheld the action of New York City in declaring the franchise of a corporation forfeited for non-user. Contract rights, said Justice Hughes, must be exercised in conformity with the grant: "It is a tacit condition annexed to grants of franchises that they may be lost by misuser or nonuser."²¹³

The Reservation of Power to Repeal, Alter, or Amend. The Dartmouth College case brought to corporate charters the protection of the contract clause. It also contained the suggestion that they could be made subject to amendment or repeal. Justice Story, in his concurring opinion, pronounced it "one of the most stubborn and well settled doctrines of the common law" that the corporate charter could not be altered or amended, unless a power for this purpose were reserved in the charter itself.²¹⁴ The early history of the adoption of such reservation

²¹⁰ 113 U. S. 574 (1885).

²¹¹ See also *Cosmopolitan Club v. Virginia*, 208 U. S. 378 (1908).

²¹² 235 U. S. 179 (1914).

²¹³ *Ibid.*, p. 194. Cf. *Given v. Wright*, 117 U. S. 648 (1886).

²¹⁴ 4 Wheat. 518, 675 (1819). His authority was *Rex v. Passmore*, 3 T. R. 199, and cases there cited. A similar statement had earlier been made by Chief Justice Parsons in *Wales v. Stetson*, Treasurer of the Blue Hill Turnpike Co., 2 Mass. 143 (1806).

clauses in statutes and constitutions has been considered in Part I.²¹⁵ At the present time nearly all of the state constitutions contain a clause of this kind,²¹⁶ and statutory reservation clauses are to be found in the laws of those states as well as in many of the states where there are constitutional clauses.²¹⁷

The general adoption of this reservation in one form or another has, with the possible exception of the rise of due process, been the principal factor in the decline of the contract clause. But there have been many cases in which the Court has been concerned with the meaning and applicability of such clauses,²¹⁸ as well as a great many situations in which the Court found that the state had clearly reserved the necessary powers.²¹⁹ In some of the decisions in which there is discussion of the reserved power to amend or repeal, both constitutional and statutory clauses were involved.²²⁰ More usually the clause has been found in a constitutional provision²²¹

²¹⁵ *Supra*, pp. 60, 86. See also E. M. Dodd, Jr., "The First Half Century of Statutory Regulation of Business Corporations in Massachusetts," *Harvard Legal Essays* (1934).

²¹⁶ So far as could be determined the constitutions of the following states do not now contain such a clause: Connecticut, Florida, Illinois, Indiana, Minnesota, Missouri, New Hampshire, Oregon, Rhode Island, West Virginia.

²¹⁷ For some contemporary examples of reservation clauses see Kerr's *Civil Code of California* (1920), div. I, pt. IV, tit. I, ch. V, sec. 404; *General Corporation Laws of Delaware* (1925), sec. 82; *General Laws of Massachusetts* (1932), vol. II, p. 1940, ch. 155, sec. 3; *Michigan Compiled Laws* (1915), p. 4026; Cummings and Gilbert, *General Laws of New York*, I, 837; *General Laws of Rhode Island*, tit. XXI, ch. 213, sec. 22.

²¹⁸ The following law review notes contain useful discussion of cases, for the most part in state and lower federal courts, dealing with this problem. 29 *Columbia Law Rev.*, 88 (1929); 14 *Cornell Law Quarterly*, 85 (1928); 15 *ibid.*, 279 (1930); 40 *Harvard Law Rev.*, 891 (1926); 43 *ibid.*, 656 (1929); 14 *Minnesota Law Rev.*, 413 (1930). See also 1 Thompson, *Corporations* (3d ed.), sec. 432; 2 Morawetz, *Corporations* (2d ed.), sec. 1106, 1107.

²¹⁹ In *Noble State Bank v. Haskell*, 219 U. S. 104 (1911), Justice Holmes curtly dismissed a contention of contract impairment by noting that the charter was "as usual" subject to repeal or alteration.

²²⁰ See, e.g., *Miller v. State*, 15 Wall. 478 (1873); *People ex rel. Schurz v. Cook*, 148 U. S. 397 (1893).

²²¹ *Shields v. Ohio*, 95 U. S. 319 (1877); *Spring Valley Water Works v. Schottler*, 110 U. S. 347 (1884); *Hamilton Gas Light & Coke Co. v. Hamilton*, 146 U. S. 258 (1892); *St. Louis & San Francisco Ry. Co. v. Gill*, 156 U. S. 649 (1895); *Looker v. Maynard*, 179 U. S. 46 (1900); *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S. 368 (1902); *San Antonio Traction Co. v. Altgelt*, 200 U. S. 304 (1906);

or a statute.²²² In other cases it was included in the charter or franchise.²²³

Most of the reservation clauses simply state that the charter or charters shall be subject to amendment, alteration, or repeal. Occasionally additional clauses are appended such as: "unless a contrary intent be therein clearly expressed,"²²⁴ "in any manner not destroying or impairing the vested rights of said corporation,"²²⁵ "providing that no injustice be done."²²⁶ Clauses of special or unorthodox types are those reserving the right to revise or establish rates,²²⁷ to prohibit the running of locomotives,²²⁸ reserving the right to make further rules, orders, or regulations,²²⁹ or reserving the right to control all privileges or franchises granted by the legislature, or created under its authority.²³⁰

Discussion of the Effect of Reservation Clauses in Cases Sustaining Alterations or Repeal. Almost without exception the cases dealing with the legal effect of reservation clauses have been decided since the Civil War.²³¹ One of the first is the

Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453 (1906); Hammond Packing Co. v. Arkansas, 212 U. S. 322 (1909); Ramapo Water Co. v. New York, 236 U. S. 579 (1915); Puget Sound Traction, Lt. & Power Co. v. Reynolds, 244 U. S. 574 (1917); Superior Water, Lt. & Power Co. v. Superior, 263 U. S. 125 (1923); Ft. Smith Lt. & Traction Co. v. Ft. Smith, 274 U. S. 387 (1927).

²²² Sherman v. Smith, 1 Black 587 (1862); Holyoke Co. v. Lyman, 15 Wall. 500 (1873); Beer Co. v. Massachusetts, 97 U. S. 25 (1878); Greenwood v. Freight Co., 105 U. S. 13 (1882); New Orleans Gas Co. v. Louisiana Lt. Co., 115 U. S. 650 (1885); Adirondack Ry. Co. v. New York, 176 U. S. 335 (1900); Calder v. Michigan, 218 U. S. 591 (1910); Owensboro v. Cumberland Tel. & Tel. Co., 230 U. S. 58 (1913); Sears v. Akron, 246 U. S. 242 (1918).

²²³ Pennsylvania College Cases, 13 Wall. 190 (1872); R.R. Co. v. Richmond, 96 U. S. 521 (1878); Sinking Fund Cases, 99 U. S. 700 (1878); Pearsall v. Great Northern Ry. Co., 161 U. S. 646 (1896); Southern Pacific Co. v. Portland, 227 U. S. 559 (1913); International Bridge Co. v. New York, 254 U. S. 126 (1920).

²²⁴ Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683 (1885).

²²⁵ Pearsall v. Great Northern Ry. Co., 161 U. S. 646 (1896).

²²⁶ Bienville Water Supply Co. v. Mobile, 186 U. S. 212 (1902); Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453 (1906).

²²⁷ Cleveland v. Cleveland City Ry. Co., 194 U. S. 517 (1904); Puget Sound Traction, Lt. & Power Co. v. Reynolds, 244 U. S. 574 (1917).

²²⁸ Southern Pacific Co. v. Portland, 227 U. S. 559 (1913).

²²⁹ Detroit v. Detroit Citizen's St. Ry. Co., 184 U. S. 368 (1902).

²³⁰ San Antonio Traction Co. v. Altgelt, 200 U. S. 304 (1906).

²³¹ *Supra*, p. 65.

Pennsylvania College cases.²³² Here the Court, in upholding a statute uniting two colleges and authorizing the location of the new institution in a city some miles from the site of one of the original colleges, observed that the exercise of the reserved power impaired neither the contractual obligations contained in the charter nor those in contracts made with third parties.²³³ As to the latter the Court said that third parties knew that the legislature might alter or repeal the charter; as to the former, that the reservation clause qualified the grant so that later amendment or repeal could not be regarded as "an act within the prohibition of the constitution."

In *Miller v. State*²³⁴ statutes authorizing a city to elect a majority of the directors of a corporation instead of a minority of them was sustained because of a reservation clause. The Court said that reserved power could not be exercised to destroy rights acquired under the charter, but that it could be used to almost any extent to carry into effect the original purpose of the grant or to secure due administration of corporate affairs. Justice Bradley, in a dissenting opinion, concurred in by Justice Field, said that, while the legislature might reserve the right to revoke or change its own grant of chartered rights, it could not reserve a right to invalidate contracts between third parties. He thought the agreement as to the directors was no part of the company's charter. While upholding a rate-fixing statute the Court, in *Shields v. Ohio*,²³⁵ observed again that the power of alteration is not without limit, and that amendments must be reasonable and consistent with the scope and

²³² 13 Wall. 190 (1872).

²³³ The contracts here referred to were scholarships previously sold by the college which was moved to a new location.

²³⁴ 15 Wall. 478 (1873). In *Holyoke Co. v. Lyman*, 15 Wall. 500 (1873), the Court repeated the dictum that vested rights could not be destroyed or impaired under such a reserved power.

²³⁵ 95 U. S. 319 (1877). Justice Strong dissented. He agreed that the legislature had reserved the power to alter or repeal, but denied that the legislature could take away the right to change such rates as the corporation considered reasonable while continuing it in existence. This is "taking away the property of the company without compensation."

object of the act of incorporation. Vested rights were declared to be beyond the sphere of the reserved powers.

While the Sinking Fund cases ²³⁶ involved an act of Congress and the contract clause was not properly concerned, the opinions of the Court read very much as if there were a clause of the kind limiting Congressional powers.²³⁷ The act in question provided for the establishment of a sinking fund by the Union Pacific and Central Pacific Railroads. These roads were chartered by Congress and the government had reserved the power to amend. Chief Justice Waite for the Court agreed that this reserved power was limited, that it could not be used to take away property already acquired. "It cannot unmake contracts that have already been made," but it may provide for the future, and "may direct what preparation shall be made for the due performance of contracts already entered into."²³⁸ Justices Strong, Bradley, and Field each wrote a dissenting opinion. The first said that reserved powers must be so exercised as to do no injustice to those to whom the franchise had been granted.²³⁹ Justice Bradley admitted that the contract clause did not apply as against the federal government, but asserted that nevertheless Congress could no more pass "arbitrary and despotic laws with regard to contracts than with regard to any other subject matter of legislation."²⁴⁰ And so far as state reservation clauses are concerned, the reservation simply put the legislature in the same position as if the constitutional prohibition on impairment of contracts never existed. Justice Field added that alterations could only operate for the future; they could not operate upon that which had been done and vested.

²³⁶ 99 U. S. 700 (1879).

²³⁷ In the Federal Convention Elbridge Gerry moved that the contract clause be made applicable to Congress, but his motion went unseconded (*supra*, p. 9). So far as a specific clause of the Constitution was here invoked it was the due process clause of the Fifth Amendment.

²³⁸ 99 U. S. at 721.

²³⁹ As a "partial definition" of the limits of the reserved power he cited the statement of Chief Justice Shaw in *Commonwealth v. Essex County*, 13 Gray (Mass.) 239 (1859).

²⁴⁰ 99 U. S. at 746.

*Greenwood v. Union Freight R. R. Co.*²⁴¹ sustained the repeal of a franchise under authority of the reservation clause contained in the Massachusetts act providing for the incorporation of industries.²⁴² Such a repeal abrogates whatever power depended solely upon the grant of the charter, but the rights of the shareholders to the property of the corporation are not destroyed, and if the legislature provides no method for protecting such rights the courts will do so. It was entirely within the power of the legislature to grant to another corporation the right to operate a railway over the right of way used by the corporation whose franchise had been repealed.

There is no need to multiply the citation of cases in which the Court has sustained statutes altering or repealing powers granted by corporate charters under the authority of reservation clauses. With a cautious qualification concerning the contract rights of the corporation with third persons, and the vested property rights of the corporation, the Court has many times given effect to such reservation clauses.²⁴³

Cases in which the Reservation was Held not to Justify the Statute. Although it was not until comparatively recently that the Court gave effect to its frequent dicta concerning the limits to action under reservation clauses, the same result was achieved in several cases by a process of construction often hardly consistent with the usual one that public grants will be strictly construed. In *Louisville Gas Company v. Citizens' Gas Company*²⁴⁴ the Court considered the exceptional reservation clause contained in the Kentucky act of 1856 providing that the legislature could amend or repeal charters or grants at will, "unless a contrary intent be therein plainly expressed." The grant of

²⁴¹ 105 U. S. 13 (1882).

²⁴² The act of 1831 in effect when the charter was granted provided that every act of incorporation passed thereafter should "be subject to amendment, alteration, or repeal, at the pleasure of the legislature."

²⁴³ See, e.g., *Looker v. Maynard*, 179 U. S. 46 (1900); *San Antonio Traction Co. v. Altgelt*, 200 U. S. 304 (1906); *Calder v. Michigan*, 218 U. S. 591 (1910); *Puget Sound Traction, Lt. & Power Co. v. Reynolds*, 244 U. S. 574 (1917); *Sears v. Akron*, 246 U. S. 242 (1918); *Ft. Smith Light & Traction Co. v. Ft. Smith*, 274 U. S. 387 (1927).

²⁴⁴ 115 U. S. 683 (1885).

an exclusive privilege to supply gas, viewed in the light of a subsequent amendatory act requiring concurrence of the city council and the company's directors in any alteration of the charter, was held not subject to change by the legislature of the state. The Court ruled that the amendatory act "plainly expressed" an intent that the charter should not be changed at the mere will of the legislature. More doubtful is the interpretation given in *Detroit v. Detroit Citizens' Street Railway Company*,²⁴⁵ in which the city attempted to secure a reduction in rates from the five-cent maximum fixed in the charter. Although the state constitution reserved the right to alter or amend, the action of the city was overruled on the ground that the reservation applied only to the action of the legislature and did not enable a municipality to regulate street railway rates contrary to a provision in a charter. In the same case a municipal ordinance reserving to the council the right to make further rules and regulations was held not to apply to altering the rate of fares. The latter, being a "vital portion" of the contract, is not subject to amendment unless there is a clear stipulation to that effect.²⁴⁶ In *Vicksburg v. Vicksburg Waterworks Company*²⁴⁷ the reservation in question was that of the Mississippi constitution of 1890, which was conditioned by the provision that "no injustice shall be done to the stockholders." The creation by the city of a plant in competition with one given a monopoly for a stipulated period was held to work such injustice.

A clear case of the strict construction of a reservation clause is *Owensboro v. Cumberland Telephone and Telegraph Company*.²⁴⁸ The company had been granted the right to use the streets with the provision that the ordinance might be altered or amended "as the necessities of the city may demand." Jus-

²⁴⁵ 184 U. S. 368 (1902).

²⁴⁶ Cf. *Cleveland v. Cleveland City Ry. Co.*, 194 U. S. 517 (1904).

²⁴⁷ 202 U. S. 453 (1906). Although the Court discussed the effect of the reservation clause here, it said that it did not apply since the plaintiff company had acquired contract rights before the adoption of the constitution.

²⁴⁸ 230 U. S. 58 (1913).

tice Lurton, however, held that this constituted "no more than a reservation of the police control of the streets," which was in any event "incident to the unabridgeable police power of the city."²⁴⁹ Hence it was both unnecessary and ineffective, since the powers of the city would have been the same without it. At any rate, it did not empower the city to order the removal of the company's poles and wires, for, said the Court, the contract involved could not be revoked unless such a power was "clearly and unmistakably" reserved.²⁵⁰

Limits to the Effectiveness of Reservation Clauses. In *Superior Water, Light & Power Co. v. Superior*²⁵¹ the Court construed a reservation clause contained in the Wisconsin constitution not to empower the legislature to require public utilities to surrender their franchises and accept in lieu thereof indeterminate permits. The predecessor of the company here involved was incorporated by special act under authority of a constitutional provision that "all general laws or special acts, enacted under the provisions of this section, may be altered or repealed by the legislature at any time after their passage." But the plaintiff in this cause held franchise contracts made directly with the city of Superior. The company was given exclusive rights for thirty years from 1887, and if the franchise was not extended at the end of that period the city agreed to purchase at a price fixed on the basis of the capitalized earnings of the previous year. The Wisconsin Supreme Court sustained the legislative act under the reservation clause of the state constitution, but the Supreme Court of the United States, in an opinion which appears to depend very largely upon the earlier interpretations of this clause by the Wisconsin courts,²⁵² held that this attempted interference with vested property

²⁴⁹ *Ibid.*, p. 72.

²⁵⁰ Justices Day, McKenna, Hughes, and Pitney dissented.

²⁵¹ 263 U. S. 125 (1923).

²⁵² Justice McReynolds quotes with approval the statement in *State ex rel. Northern P. R. Co. v. R.R. Comm.*, 140 Wis. 145, 157 (1909): "The right to alter or repeal existing charters is not without limitation when the question of vested property rights under the charter is involved. The power is one of regulation and control and does not authorize interference with property rights vested under

rights violated the contract clause of the Federal Constitution. Except in the quotations from these opinions there is virtually no discussion of the effect and limitations of reservation clauses.

*Coombes v. Getz*²⁵³ contains a slightly longer discussion of the bounds of the reserved power to amend, although it is far from definitive. The Court held that the repeal of a constitutional provision making directors liable to creditors for money embezzled or misappropriated by officers of the corporation was void under the contract clause when applied to abate an action brought against a director by a creditor of the corporation.²⁵⁴ Section 1, Article 12, of the California constitution is as follows: "All laws now in force in this state concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed." The state Supreme Court held this to justify the repeal statute, but Justice Sutherland for the majority²⁵⁵ said that "the authority of a state under the so-called reserved power is wide; but it is not unlimited. The corporate charter may be repealed or amended and within limits not now necessary to define, the interrelations of state, corporation and stockholders may be changed; but neither vested property rights nor the obligation of contracts of third persons may be destroyed or impaired."²⁵⁶ In support of this statement he cites *Tomlinson v. Jessup*²⁵⁷ and *Lake Shore & M. S. R. Co. v. Smith*.²⁵⁸ In the first of

the power granted. . . . The reserve power stops short of the power to divest vested property rights, and is embodied in the state constitution for the purpose of enabling the state to retain control over corporations, and must be construed in connection with the other provisions of the Constitution to the effect that private property shall not be taken for public use without compensation."

²⁵³ 285 U. S. 434 (1932).

²⁵⁴ The suit had been brought and a judgment rendered in the California superior court before the repeal of the liability provision in the state constitution. At the time of repeal an appeal to the state Supreme Court was pending.

²⁵⁵ Justice Cardozo dissented on the ground that the liability of the directors was, by law of the state, defeasible until the cause of action ripened into judgment. On this view the repeal statute was valid without reference to the reservation clause of the constitution, and he argued that that clause was irrelevant to the case. Justices Brandeis and Stone concurred in the dissent.

²⁵⁶ 285 U. S. 434 at 441-42.

²⁵⁷ 15 Wall. 454 (1873).

²⁵⁸ 173 U. S. 684 (1899).

these the revocation of a tax exemption was sustained under authority of a reservation clause. In his opinion Justice Field, after saying that "the reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges and immunities derived by its charter directly from the State," adds, "rights acquired by third parties, and which have become vested under the charter, in the legitimate exercise of its powers, stand upon a different footing; but of such rights it is unnecessary to speak here."²⁵⁹ In the second case a state statute requiring railroads to give special rates to those purchasing thousand-mile tickets was held void under the due process clause. Justice Peckham said that the contract clause contention need not be considered by the Court.²⁶⁰ But on the page to which Justice Sutherland refers²⁶¹ he did remark that even under a reservation clause the legislature "has no right . . . to take away or destroy the property or annul the contracts of a railroad company with third persons." The authority for the holding in *Coombes v. Getz* then is the old and familiar dictum that reservation clauses do not empower the legislatures to destroy vested rights.²⁶²

There is no question of the state's power under a reservation clause to repeal a charter or franchise, so that the corporate existence ends or its privileges cease. Alterations are permitted within what the Court considers reasonable limits. Here, as in the frequent discussion of change of remedies under the contract clause and of the limits of the police power under due process, there is no precise standard available. What is reasonable to one man is not reasonable to another. The pricking out of a line by a slow process of inclusion and exclusion has not yet gone far toward defining the allowable scope of the power to amend. Employing the roving commission which it

²⁵⁹ 15 Wall. at 459.

²⁶⁰ 173 U. S. at 687.

²⁶¹ *Ibid.*, p. 690.

²⁶² Although the discussion in the opinion is of the contract clause and its effect, Justice Sutherland concludes with the remark that the vested right "comes within the protection of both the contract impairment clause in Art. I, § 10, and the due process of law clause in the 14th amendment." 285 U. S. at 448.

derives from the due process clause, the Court frequently serves notice that it intends to sink all craft of a piratical, i.e., an unreasonable, nature.²⁶³ This assertion that arbitrary interferences with rights which have vested, that is, been reduced to possession in the eyes of the law, has not become an important restriction upon the effectiveness of reservation clauses, although it might easily be expanded to that degree. The history of due process would seem to be sufficient warrant for believing that such a development is at least possible. Some of the recent discussions of the scope of reservation clauses are reminiscent of Marshall's and Story's language in *Fletcher v. Peck* and *Terrett v. Taylor*.²⁶⁴ The "spirit and letter of the Constitution," the "principles of natural justice," the "nature of society and of government," phrases which were instruments in the early expansion of the contract clause, as well as in the growth of due process of law two or three generations later, form the intangible basis for the conception that a reservation clause does not empower unreasonable interferences with the rights of property. To the extent that this zeal for the protection of vested rights is given content, to that extent Marshall's dissenting opinion in *Ogden v. Saunders*, as well as his contract opinions where he was speaking for the majority, will have triumphed.

²⁶³ See the opinion of Justice Butler in *Phillips Petroleum Co. v. Jenkins*, 297 U. S. 629 (1936). The contract clause is said not to be applicable because there is a reservation clause. Then it is asserted that there are limitations upon this clause which apparently flow not from the contract clause but from the due process clause, or from the inherent nature of corporate charters.

²⁶⁴ *Supra*, pp. 32, 38.

CHAPTER VII

TAX EXEMPTION

IN *New Jersey v. Wilson*,¹ the first case announcing the doctrine that a state may make a contract for the permanent exemption of a specified property from taxation, there is no discussion of the wisdom of extending the contract clause to cover such agreements. The contract there involved was one between the colonial government and an Indian tribe, and the land to which the exemption attached had passed out of the Indians' ownership. But Marshall was so devoted to the "sanctity of contracts" that he apparently had no hesitation in holding that the limitations of the clause applied to this situation. There was then and, so far as can be discovered, has since been no attempt to justify this broadening of the clause in terms of the legislation which led to its adoption. Yet so strong was the judicial distrust of legislative action that the doctrine was very generally accepted by the state courts within the next few decades.² There were some later expressions by members of the Court of the opinion that the doctrine was an unwise one,³ but it has never been repudiated. To the contrary, it has been very frequently applied. During the expansive years of the first half of the nineteenth century the desire of the states, especially the new ones, to promote the establishment of banks, of railroads, of manufacturing plants, and of educational and charitable institutions led to frequent grants of partial or total tax immunity. Subsequent regret of the generosity of early legislatures has, almost as frequently, brought attempted altera-

¹ 7 Cranch 164 (1812). See p. 34, above.

² See especially *Atwater v. Woodbridge*, 6 Conn. 223 (1826); *Osborne v. Humphrey*, 7 Conn. 335 (1829); *Landon v. Litchfield*, 11 Conn. 251 (1836); *Seymour v. Hartford*, 21 Conn. 481 (1852); *Herrick v. Randolph*, 13 Vt. 525 (1841); *O'Donnell v. Bailey*, 24 Miss. 386 (1852). Also *Portland Bank v. Apthorp*, 12 Mass. 252 (1815), referred to *supra*, p. 38, n. 35.

³ *Supra*, p. 75.

tions in those grants. As a result there have been many cases, scores of them in the Supreme Court, involving the interpretation of the original grants. The Court has always professed to adhere to the principle stated by Marshall in the *Providence Bank* case,⁴ that such grants are never to be presumed, that they must be specifically set forth. But so general a formula, unaided by the development of numerous corollaries, could not solve many of the difficult problems of construction presented to the Court. There have been many corollaries proposed and applied in one, sometimes in several cases. But there have been very few principles which have been consistently followed.

Consideration. Partly on the analogy of the law of contracts and partly, in all likelihood, because of some lingering doubts about the doctrine of contracts for tax exemption, it has frequently been said that a grant of tax immunity is not protected under the contract clause unless it is given for a consideration. Gratuitous grants are subject to repeal at the will of the grantor. It was upon the basis of this assumption that Cooley rationalized the principle of contracts for tax exemption: "The State laws which have been enforced as contracts in these cases have been supposed to be based upon consideration, by which the State receives the benefit which would have accrued from an exercise of the relinquished power in the ordinary mode."⁵ There is room to doubt whether the state received an equivalent benefit in many of the instances of such grants, as well as whether the principle that a consideration is a requisite part of every valid contract for tax exemption has been uniformly enforced.

The first case in which this corollary was expressed was decided in 1860.⁶ By an act of 1833 Pennsylvania exempted the Christ Church Hospital from all taxes on its real property. A

⁴ *Providence Bank v. Billings*, 4 Peters 514 (1830).

⁵ *Constitutional Limitations* (1868 ed.), p. 283. Cf. the argument of Greenleaf as counsel in *Charles River Bridge v. Warren Bridge*, 11 Peters 420, 467 (1837).

⁶ *Christ Church v. Philadelphia*, 24 How. 300 (1860). This case, curiously, is not cited by Cooley.

tax was imposed on this, along with other similarly situated property, in 1851. Before the Court the state did not contest the argument that the legislature has power permanently to exempt property from taxation but it claimed that there was here no legal consideration, hence no contract of exemption. A unanimous Court sustained the repeal of the exemption. That this holding was not immediately accepted for all that might be deduced from it is made clear by two decisions in 1869. The first⁷ of these cases involved a charitable institution, the second⁸ a university. Both were, under their charters, tax exempt. Both were assessed for taxes after the adoption of the Missouri constitution of 1865 forbidding the state to enter into any contract for tax exemption. Counsel for the state relied heavily upon the principle set forth by the unanimous Court in the Christ Church case. Former Justice Curtis for the appellants carefully avoids that decision, and, although he refers to the cases collected by Cooley on the power of a state to alienate the right to tax, he does not cite the page on which Cooley supports this principle on the basis of consideration.⁹ Justice Davis for the Court does not mention the Christ Church case, thereby avoiding the necessity of making a difficult distinction. He does say, however, that the consideration here was the object for which the charity was created. "This has been the well-settled doctrine of this Court on this subject since the case of *Dartmouth College v. Woodward*."¹⁰

In 1872 a unanimous Court sustained a Michigan act taxing a salt company, although a statute in existence at the time of its organization specified that such companies were to be tax exempt. The decision was based upon the principle that the exemption was not contained in a special charter, but was to be

⁷ *Home of the Friendless v. Rouse*, 8 Wall. 430 (1869).

⁸ *Washington University v. Rouse*, 8 Wall. 439 (1869).

⁹ He cites pp. 279-81 of the *Constitutional Limitations*, not p. 283.

¹⁰ Chief Justice Chase and Justices Field and Miller dissented without opinion in this case. In the *Washington University* case the other two concur in an opinion, quoted from *supra*, in which Justice Miller flatly denies the power of any legislature permanently to alienate the taxing power.

found only in a general law.¹¹ Five years later the Court sustained a Wisconsin statute repealing a tax exemption contained not in a charter but in a special act granting certain land to a railroad and providing that it should be tax exempt.¹²

That the combined authority of the Christ Church case and Cooley's *Constitutional Limitations* have amounted to little more than the acceptance of the principle that the grant of immunity sought for must be contained in a specific contract is further illustrated by the case of *Seton Hall College v. South Orange*.¹³ Here a college incorporated in 1861 was by an act supplementary to the charter in 1870 given tax immunity. Until 1911 it paid no taxes. It was then assessed for taxes upon part of its property. In sustaining the tax the Court distinguished *Home of the Friendless v. Rouse*,¹⁴ where there was an explicit grant of exemption in the charter, but did not even cite as an authority the Christ Church case.¹⁵

Construction of Grants of Tax Exemption. The foregoing discussion has concerned instances in which the existence of a contract for tax exemption was in doubt. Even where the grant

¹¹ *Salt Co. v. East Saginaw*, 13 Wallace 373 (1872). "Had the plaintiff in error been incorporated by a special charter, and had that charter contained the provision that all its lands and property used in the manufacture of salt should forever, or during the continuance of its charter be exempt from taxation, and had that charter been accepted and acted on, it would have constituted a contract." But this statute, the opinion continues, "is a bounty law and nothing more. . . . Such a law is not a contract except to bestow the promised bounty upon those who earn it so long as the law remains unrepealed."

¹² *West Wis. Ry. v. Supervisors*, 93 U. S. 595 (1876). The exemption was a "gratuity" offered by the state, "without any element of contract. There was no assurance that [it] was intended to be irrevocable, or that the law in question should not be at all times subject to modification or repeal in like manner as other legislation." See also *Grand Lodge F. & A. Masons v. New Orleans*, 166 U. S. 143 (1897); *Wisconsin & Michigan Ry. v. Powers*, 191 U. S. 379 (1903); *People ex rel. Troy Union R.R. v. Mealy*, 254 U. S. 47 (1920).

¹³ 242 U. S. 100 (1916).

¹⁴ See p. 181, above.

¹⁵ "To all claims of contract exemption from taxation must be applied the well-settled rule that, as the power to tax is an exercise of the sovereign authority of the state, essential to its existence, the fact of its surrender in favor of a corporation or an individual must be shown in language which cannot be otherwise reasonably construed, and all doubts which arise as to the intent to make such a contract are to be resolved in favor of the state." 242 U. S. 100, 106 (1916).

of tax immunity is admitted, however, more or less difficult problems of construction are involved. The general rule, which the Court has applied with a sometimes wavering fidelity, is that grants are to be strictly construed against the grantee. That even this qualified statement cannot be greatly relied upon is made evident by a series of illustrations drawn from the line-pricking process.

Perhaps the most involved problem of construction to be found in any series of cases under the contract clause is that arising from the interpretation of agreements to the effect that a tax on capital stock shall be in lieu of all other taxes.¹⁶ These cases really begin with *Gordon v. Appeal Tax Court*,¹⁷ in which the Court held that an agreement to impose no additional tax upon the capital stock of certain banks prevented the state from taxing shares of stock in the hands of private persons. This very doubtful ruling has reappeared in different forms in a long line of cases, almost all of them presenting varying, sometimes inconsistent reasons for rejecting or sustaining the taxes in question. In *Farrington v. Tennessee*¹⁸ a charter provision that the bank should pay to the state a tax of one-half of one per cent "on each share of the capital stock subscribed, which shall be in lieu of all other taxes," was held to prohibit a tax on the shareholders. Justice Strong, with whom Justices Clifford and Field joined, dissented on the ground that the majority failed to apply the rule that a presumption always exists against the relinquishment of the power to tax. The benefit of the exemption here, he argued, was intended for the corporation, not for the individual shareholders. A year later, however, in another Tennessee case, a charter exempting capital stock and providing a tax of one and

¹⁶ A very careful analysis of these decisions is given in Henry M. Hart, "State Taxation of Shares of Stock," ch. IV, an unpublished dissertation in the Harvard Law School Library.

¹⁷ 3 How. 133 (1845).

¹⁸ 95 U. S. 679 (1877). Meanwhile in *Van Allen v. Assessors*, 3 Wall. 573 (1866), the Court had held, in a case involving the taxation of shares of national bank stock, that a tax on the shares is not a tax on the capital of the bank, and in the *Delaware Railroad Tax Case*, 18 Wall. 206 (1874) the reasoning in the *Gordon* case had been greatly weakened, if not repudiated.

one-half per cent on gross receipts in lieu of all other taxes was construed to permit a tax on the property of a railroad.¹⁹ But in *Tennessee v. Whitworth*²⁰ the principle of the Gordon and Farrington cases was again applied, although on the basis of a different construction of "capital stock."²¹ Still another definition of the term is given in *New Orleans v. Houston*,²² a case involving taxes upon stockholders in a lottery company. In 1896 the ruling in the Farrington case was applied in two decisions,²³ although at the same time it was held that a tax on undivided surplus was valid, since the contract showed no clear intent to exempt more than the capital stock. Earlier the Court had held that a provision for a tax of one-half of one per cent on each share of capital stock in lieu of all other taxes did not prevent taxes on real property acquired by the bank and not used as a place of business.²⁴

Another striking illustration of some of the varieties of interpretation to be found in this group of cases appears in *New Orleans v. Citizens' Bank*.²⁵ Here a charter stipulation against further taxation of the capital of a corporation was held not to prohibit a tax collected directly from the shareholders. Since

¹⁹ *Railroad v. Gaines*, 97 U. S. 697 (1878).

²⁰ 117 U. S. 129 (1886).

²¹ It is perhaps interesting to note the Court's remark that the words here employed were capable of more than one meaning. The meaning given them, however, does not appear to have been dictated by the rule of strict construction.

²² 119 U. S. 265 (1886).

²³ *Bank of Commerce v. Tennessee*, 161 U. S. 134 (1896); *Shelby County v. Union and Planters' Bank*, 161 U. S. 149 (1896). The former case reaffirmed the doctrine of the Gordon and Farrington cases that an exemption of capital stock rendered shares held by individuals not subject to tax. The latter case limits that doctrine to the extent of asserting a clear distinction between capital stock of a corporation and shares held by individuals. The attempt to distinguish the Gordon case is more interesting than convincing.

²⁴ *Bank v. Tennessee*, 104 U. S. 493 (1882). See also *Central R.R. & Bank Co. v. Wright*, 164 U. S. 327 (1896), in which the Court allowed taxes by cities on the property of the corporation within a city although the state was forbidden to tax higher than one-half of one per cent on the annual net income and the city forbidden to tax the stock of the company. In *Railway Co. v. Loftin*, 98 U. S. 559 (1878), the Court sustained a tax on land given to the railroad by the state after the issuance of a charter exempting the capital stock from taxation. See also *New Orleans v. Citizens' Bank*, 167 U. S. 371 (1897); *Louisiana v. New Orleans*, 167 U. S. 407 (1897).

²⁵ 167 U. S. 371 (1897).

the only significant difference between this situation and that declared invalid in *New Orleans v. Houston*²⁶ is that in the latter the tax was collected from the corporation which was to be reimbursed by the stockholders, one might jump to the conclusion that the Court finally decided to abandon the position it had been attempting to establish since 1845. This assumption would be incorrect. As late as 1910 a provision for a tax "not exceeding one-half of one per cent per annum on the net proceeds of their investments" and for exemption of "the stock of the said company" served to exempt both the capital stock and individual shares, as well as the franchise and property of the company.²⁷

The difficulty of arriving at any nice generalizations concerning the rules of construction followed by the Court in tax exemption cases may be further illustrated by a consideration of other forms of tax exemption. Let us first take a group of cases where the construction is favorable to the state. Perhaps the most interesting of these involves the granting of an exemption "after completion" relative to the taxation of a corporation's physical property. It has been held that such an exemption does not render the property immune before completion. This particular construction was accepted only by a closely divided Court, as evidenced by the dissent of Justice Field, concurred in by Chief Justice Waite and Justices Miller and Bradley, in the leading case on the point.²⁸ Here the charter provided that the capital stock should be exempt from taxation and the road, fixtures, rolling stock, and other physical property should be exempt for

²⁶ 119 U. S. 265 (1886). The Court held in this case that there is a distinction between capital stock and shares held by individuals, but ruled that the tax in question was one in effect levied upon the corporation itself and was hence invalid.

²⁷ *Wright v. Georgia R.R. & Banking Co.*, 216 U. S. 420 (1910). Such in lieu tax exemptions have not been made by the states for many years, but there are some of very long or even perpetual duration which are yet in effect. Doubtless all of them have by now been construed by the courts. And yet the one involved in this case was granted in 1833 and was to run for an indeterminate period.

²⁸ *Vicksburg, Shreveport & Pacific R.R. v. Dennis*, 116 U. S. 665 (1886). In accord: *Yazoo & Miss. Valley R.R. v. Thomas*, 132 U. S. 174 (1889); *Yazoo and Miss. Valley R.R. v. Board of Levee Commissioners*, 132 U. S. 190 (1889). See also *R.R. Co. v. Loftin*, 105 U. S. 258 (1881).

ten years after completion. Taxes assessed on the road and fixtures before completion were sustained, Justice Gray saying that if the legislature had meant the immunity to cover the period before completion it would have used the words "until ten years after completion," instead of "for ten years after completion." The fact that the state did not seek to collect taxes for several years after work was begun on the road was held not to control the construction of the statute. The dissenters argued that there was here no doubt to be resolved in favor of the state. Exemption was intended and granted until ten years after completion. Furthermore the exemption is needed more before than after completion.

Several other instances of construction favorable to the state may be recited. Immunity from "all taxation of every kind" except that provided in the charter does not secure exemption from assessments by a city for street improvements.²⁹ A statute providing exemption from other taxes for mortgages and certain other secured debts taxed under it does not serve to protect against income taxes.³⁰ The legislature, said Justice Holmes, had in mind a tax on principal. A college given a tax exemption as to its endowment fund and one hundred acres of land must pay taxes on an additional tract of land, even though the income from that land is used to defray the expenses of the institution.³¹ Here the decisive factor appears to have been the exemption of one hundred acres. In another case, the charter of a theological seminary provided that the property belonging to the seminary should be exempt from taxation.³² Real estate owned by the institution and from which it derived part of its income was taxed and the tax sustained. The state court held that the exemption applied only to building used for the immediate purposes of the seminary and not for investment. The Supreme

²⁹ *Illinois Central R.R. v. Decatur*, 147 U. S. 190 (1893). Here, says Justice Brewer, the tax is not solely for the general benefit but, at least in part, for the benefit of the railroad as well. The doctrine that immunities are based upon a consideration is repeated.

³⁰ *People ex rel. Clyde v. Gilchrist*, 262 U. S. 94 (1923).

³¹ *Millsaps College v. City of Jackson*, 275 U. S. 129 (1927).

³² *Chicago Theological Seminary v. Illinois*, 188 U. S. 662 (1903).

Court affirmed this decision on the ground that there are two possible meanings to "seminary" and doubts should be resolved in favor of the state.³³

Other cases can be cited to illustrate the point that the Court will, when it wishes to do so, invoke the principle of strict construction of tax exemptions.³⁴ But it is just as true that many cases can be assembled which, when compared with some of those just summarized and others yet to be discussed, show that this principle has not invariably been followed. Three illustrations may suffice for the present. In *University v. People*³⁵ the Court sustained Northwestern University in its resistance to a tax on land owned by it and leased out for income purposes. Now it is clear that the charter granted exemption to "all property, of whatever kind or description, belonging to or owned by the corporation." But the same words appear in the Chicago Seminary charter excepting that here it is the property of the "seminary," not of the "corporation."³⁶ The difference between the two rulings is more to be found in the changed point of view of the Court between 1878 and 1903 than in the two words. Perhaps the same explanation accounts for *Asylum v. New Orleans*.³⁷ The charitable institution was granted immunity from taxation on its property. Subsequently by constitutional and statutory change the legislature in granting exemptions was limited to property used directly for charitable purposes. After this the Asylum was given a cotton press which it operated, using the proceeds for charitable purposes. The Court held that the original exemption would have covered the press; consequently the

³³ Justices White, Brown, and Holmes dissented on the ground that the term "seminary" was here synonymous with "corporation" and therefore there were no doubts to resolve.

³⁴ See, e.g., *Winona & St. Peter Land Co. v. Minnesota*, 159 U. S. 526 (1895); *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592 (1899); *McGehee v. Mathis*, 4 Wall. 143 (1866); *J. W. Perry Co. v. Norfolk*, 220 U. S. 472 (1911); *Tucker v. Ferguson*, 22 Wall. 527 (1875). For an unusual case in which the interpretation is especially favorable to the state see *North Missouri R.R. v. Maguire*, 20 Wall. 46 (1873).

³⁵ 99 U. S. 309 (1878).

³⁶ The seminary charter and the relevant part of the university charter were secured the same year, 1855.

³⁷ 105 U. S. 362 (1881).

legislature could not cut down the exemption even as applied to property later acquired. Justices Miller and Field believed, however, that the exemption in question was not required by the grant.

A Court divided five to four refused to allow the improvident state of Tennessee to tax a railroad which had been given an absolute exemption for twenty-five years and a contingent exemption after that time.³⁸ The latter exemption provided that no tax should be laid which would reduce dividends below eight per cent. No dividends had ever been paid. Chief Justice Fuller, with whom concurred Justices Gray, Brewer, and Shiras, believed that the genuine exemption was for twenty-five years, and that the remainder of the clause was only a rule of taxation and not a prolongation of an immunity. The minority also contended that the state court's finding that the exemption was invalid under the state constitution should be sustained, but the majority brushed this aside.³⁹

A somewhat more definite problem is presented by the group of cases involving the question whether an exemption from taxation is given when the charter grants to a new company the privileges of a company that has an exemption. In the first of them ⁴⁰ the grant to one railroad of the "powers, rights and privileges" of another already in existence served to give to the new corporation the tax immunity of the old. But with very rare exceptions ⁴¹ since that time the Court has refused to find that a tax exemption provision has been granted to a new company even though it may be extended the "privileges" or the "rights, powers and privileges" of the one in existence. For example, in a case ⁴² where one company had by its charter the privilege of an in lieu tax, a second company was granted all the privileges and immunities of the first, and a third all the "privileges" of the

³⁸ *Mobile & Ohio R.R. v. Tennessee*, 153 U. S. 486 (1894).

³⁹ See also *Wilmington R.R. v. Reid*, 13 Wall. 264 (1871); *Raleigh & Gaston R.R. v. Reid*, 13 Wall. 269 (1871); *Pacific R.R. v. Maguire*, 20 Wall. 36 (1873); *Wright v. Ga. R.R.*, 216 U. S. 420 (1910).

⁴⁰ *Humphrey v. Pegues*, 16 Wall. 244 (1873).

⁴¹ Perhaps the clearest is *Tennessee v. Whitworth*, 117 U. S. 139 (1886).

⁴² *Phoenix Fire & Marine Ins. Co. v. Tennessee*, 161 U. S. 174 (1896).

second, the Court held that the exclusion of "immunities" from the third charter was sufficient to cast doubt upon the intent of the legislature to grant that company the exemption contended for.⁴³ Likewise it has held that unless there is a specific provision to that effect the exemption of the main line of a railroad does not extend to a branch line.⁴⁴

Difficult problems of construction have also been presented by cases involving the leasing of tax-exempted property. In *Jetton v. University of the South*⁴⁵ the Court held that lessees of university land were not entitled to the tax exemption applying to all property belonging to the university. Justice Peckham found that different interests may exist in the same land, and that an exemption granted to the owner does not prevent taxation of an interest in the same land granted by the owner to another as lessee for a term of years. The tax involved was on leasehold interests, and hence reached the lessee directly. A few years later, however, a closely divided Court held that the lessee of two railroads was entitled to the benefit of the tax provisions in the charters of the lessors.⁴⁶ Justice Holmes based his decision on certain special acts of the legislature relative to the lease, which acts he found extended the immunity to the lessee.⁴⁷

Effect of the Reserved Right to Amend, Alter, or Repeal. The attitude of the Court toward the interpretation of general constitutional or statutory provisions reserving the right to amend,

⁴³ See also *R.R. Cos. v. Gaines*, 97 U. S. 697 (1878); *R.R. Co. v. Commissioners*, 103 U. S. 1 (1880); *Wright v. Ga. R.R. Co.*, 216 U. S. 420 (1910); *Rochester Ry. Co. v. Rochester*, 205 U. S. 236 (1907).

⁴⁴ *Chicago, Burlington, & K. C. R.R. v. Guffey*, 120 U. S. 569 (1887); *Wilmington & Weldon R.R. v. Alsbrook*, 146 U. S. 279 (1892).

⁴⁵ 208 U. S. 489 (1908).

⁴⁶ *Wright v. Central of Georgia Ry.*, 236 U. S. 674 (1915); *Wright v. Louisville & Nashville R.R.*, 236 U. S. 687 (1915); *Central of Georgia Ry. v. Wright*, 248 U. S. 525 (1919). Justice Lamar did not sit and Justices Hughes, Pitney, and McReynolds dissented. Hughes in his dissent considered the *Jetton* case at some length, concluding that "a lessee is in no better position to claim tax exemptions or limitations than a mortgagee, or a purchaser at a foreclosure sale who, under legal authority, takes all the property, franchises, and privileges of the mortgagor."

⁴⁷ He was careful not to say that the exemption passed by assignment, or that the property was exempted generally regardless of those into whose hands it might pass. He limited himself to construing the special acts of Georgia of 1838 and 1852 permitting and encouraging the lease in question.

alter, or repeal charter provisions is illustrated by the relatively early case of *Tomlinson v. Jessup*.⁴⁸ At the time the charter here in question was granted South Carolina had a law providing that every charter should be subject to alteration or repeal unless exempt from the terms of the statute. This company was not excepted and when its charter was later amended to allow a tax exemption the exemption was not excepted from the terms of the general law which was still in effect. The Court sustained the state in its attempt to tax the company on the ground that the state had reserved the right to amend.⁴⁹ However, a statute reserving the right to alter, amend, or repeal is not effective as applied to a charter subsequently granted when the legislature making the grant has expressly exempted it from the provisions of the general statute then in existence.⁵⁰ Of course, if the right to alter, amend, or repeal is contained in a constitutional provision a legislative attempt to make an exception is of no effect.⁵¹ Nor may a city grant an exemption which is forbidden by a state statute in effect at the time.⁵²

Transfer of the Tax Exemption. Although the original case on tax exemption under the contract clause, *New Jersey v. Wilson*, had to do with transfer of the exemption, it would not be correct to assume that the exemption has passed to the new corporation upon absorption or extinction of the corporation to which the original grant was made. Many cases involving this aspect of the question grew out of the consolidation of rail-

⁴⁸ 15 Wall. 454 (1872).

⁴⁹ In accord: *Hoge v. R.R. Co.*, 99 U. S. 348 (1878); *Covington v. Ky.*, 173 U. S. 231 (1899); *Citizens' Savings Bk. v. Owensboro*, 173 U. S. 636 (1899); *Deposit Bk. v. Owensboro*, 173 U. S. 662 (1899); *Farmers' & Traders' Bk. v. Owensboro*, 173 U. S. 663 (1899); *Stone v. Farmers Bk. of Ky.*, 174 U. S. 409 (1899); *Fidelity Trust v. Louisville*, 174 U. S. 429 (1899). Some doubt seems to be cast upon this principle by Justice Miller's murky opinion in *New Jersey v. Yard*, 95 U. S. 104 (1877), since he apparently says that one legislature cannot by such a statute bind its successors. However, that case really turned upon an interpretation of legislative intent. See also *Stearns v. Minnesota*, 179 U. S. 223 (1900); *Duluth & Iron Range R.R. v. St. Louis County*, 179 U. S. 302 (1900).

⁵⁰ *Trask v. Maguire*, 18 Wall. 391 (1873).

⁵¹ *Gulf & Ship Is. R.R. v. Hewes*, 183 U. S. 66 (1901).

⁵² *Sioux City St. Ry. v. Sioux City*, 138 U. S. 98 (1891).

roads. In *Tomlinson v. Branch*,⁵³ the Court held that after consolidation of two railroads, one having a tax exemption, the other not having one, the immunity did not extend beyond the property of the road previously exempt.⁵⁴ Furthermore the tax exemption does not pass to a new owner automatically. The Court has repeatedly held that immunity from taxes is not a part of the franchise which passed to the assignee without express legislative authorization.⁵⁵ This conclusion certainly represents a limitation on the breadth of the doctrine in *New Jersey v. Wilson*.

The general theory by which the process of restricting the generosity of the great Chief Justice toward all manner of private property has been carried on is that the exemption is a privilege which pertains to the corporation and not to the property.⁵⁶ Hence it does not pass by assignment of the property even though the other privileges given in the franchise do pass. And the Court has also held that if, when a consolidation takes place, a new corporation is formed, the new corporation takes any immunity transferred subject to the existing statutory or constitutional limitations.⁵⁷ Thus a statute or a constitutional provision prohibiting tax exemptions and adopted after the creation of corporations A and B, both of

⁵³ 15 Wall. 460 (1872).

⁵⁴ See also *Charleston v. Branch*, 15 Wall. 470 (1872); *Central R.R. & Banking Co. v. Ga.*, 92 U. S. 665 (1875); *Chesapeake & Ohio R.R. v. Va.*, 94 U. S. 718 (1876); *Southwestern R.R. v. Wright*, 116 U. S. 231 (1886).

⁵⁵ *Morgan v. La.*, 93 U. S. 217 (1876); *R.R. Co. v. County of Hamblen*, 102 U. S. 273 (1880); *Wilson v. Gaines*, 103 U. S. 417 (1880); *L. & N. R.R. v. Palmer*, 109 U. S. 244 (1883); *Memphis & L. R. R.R. v. R.R. Commrs.*, 112 U. S. 609 (1884); *Chesapeake & Ohio Ry. v. Miller*, 114 U. S. 176 (1885); *Pickard v. E. Tenn. Va. & Ga. R.R.*, 130 U. S. 637 (1889); *Morris Canal & Banking Co. v. Baird*, 239 U. S. 126 (1915).

⁵⁶ See esp. *Chesapeake & Ohio Ry. v. Miller*, 114 U. S. 176 (1885), and cases there cited.

⁵⁷ *R.R. Co. v. Maine*, 96 U. S. 499 (1877); *R.R. Co. v. Ga.*, 98 U. S. 359 (1878); *St. Louis, Iron Mt. S. Ry. v. Berry*, 113 U. S. 465 (1885); *Keokuk & Western R.R. v. Mo.*, 152 U. S. 301 (1894); *Yazoo & Miss. Valley Ry. v. Adams*, 180 U. S. 1 (1901); *Northern Central Ry. v. Md.*, 187 U. S. 258 (1902). See also *Chicago, B. & K. C. R.R. v. Guffey*, 122 U. S. 561 (1887); *Gr. N. Ry. v. Minn.*, 216 U. S. 206 (1910); *Chicago G. W. Ry. v. Minn.*, 216 U. S. 234 (1910); *Mercantile Bk. v. Tenn.*, 161 U. S. 161 (1896).

which have perpetual tax exemptions by their charters, is not an impairment of the obligation of contract with corporation C, formed from A and B after the new provision is adopted. The new corporation is subject to the laws in existence at the time of its formation.

License Taxes. At various times counsel for corporations have attempted to get from the Court a ruling that annual license taxes constitute a violation of the obligation of contract contained in the franchise. Invariably the Court has relied upon the point of view of the Providence Bank case, and of the earlier Massachusetts case, *Portland Bank v. Apthorp*,⁵⁸ and refused to find an exemption implied by the fact of having a franchise.⁵⁹ Not only has it held that the possession of a franchise does not relieve the grantee from paying a subsequently imposed license tax, but it has also held that where a license tax or some exaction is imposed when a franchise is granted, the franchise does not constitute a contract which disables the state from imposing a higher or different tax.⁶⁰

Covenants for Quiet Enjoyment. The Court has also refused to hold that where the state or city has leased or sold lands by deeds containing covenants for quiet enjoyment that the imposition of a tax is an impairment of the contract.⁶¹ Where a valid exemption has been given for a limited period of time such exemption contains no surrender of the taxing power which is not explicitly granted.⁶²

⁵⁸ 12 Mass. 252 (1815).

⁵⁹ *Puget Sound Power & Light Co. v. Seattle*, 291 U. S. 619 (1934); *Memphis Gas Light Co. v. Shelby County*, 109 U. S. 398 (1883); *Home Insurance Co. v. Augusta*, 93 U. S. 116 (1876); *New Orleans City & Lake R.R. v. New Orleans* 143 U. S. 192 (1892). In the last of these cases the Court was careful to distinguish *Gordon v. Appeal Tax Court*, 3 How. 133 (1845). It also said that insofar as any part of the opinion in that case supports the contention against the license tax it has been disapproved.

⁶⁰ *Ry. Co. v. Phila.*, 101 U. S. 528 (1879); *St. Louis v. United Rys.*, 210 U. S. 266 (1908); *Metropolitan St. Ry. v. N. Y. Bd. Tax Commissioners*, 199 U. S. 1 (1905); *The Delaware R.R. Tax*, 18 Wall. 206 (1873).

⁶¹ *Trimble v. Seattle*, 231 U. S. 683 (1914); *Wells v. Savannah*, 181 U. S. 531 (1901).

⁶² *Bailey v. Magwire*, 22 Wall. 215 (1874); *Tucker v. Ferguson*, 22 Wall. 527 (1874); *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365 (1882); *People*

Effect upon Contracts between Third Parties. From the decision in *State Tax on Foreign Held Bonds*,⁶³ it would seem that the Court came close to developing the principle that a tax which materially alters the contractual relationship of third parties is invalid under the contract clause. A Pennsylvania statute provided that a railroad doing business in the state should retain five per cent on the value of its bonds held by non-residents and pay this to the state as a tax. Justice Field for the Court held this to be a violation of the contractual relationship between the railroad and its bondholders. Although the opinion has the emphatic quality produced by Justice Field's emotional convictions, its effect as a precedent is somewhat limited by his confusion of the contract clause and the problem of extraterritorial taxation. Nevertheless, it would seem that such a statement as this would have its effect: "a law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation . . . such a law relieves the parties from the moral duty of performing the original stipulations of the contract, and it prevents their legal enforcement."⁶⁴ In the very next year, however, the Court appeared to be withdrawing from the implications of this sweeping doctrine,⁶⁵ and more recent cases have brushed aside, almost without consideration, the argument of counsel that a tax may unconstitutionally impair the obligation of contract between third parties.⁶⁶ The specific effect of Field's early decision has been confined to cases where the tax was deemed to be without jurisdiction, and his doctrine has since been swallowed by due process.

ex rel. Brooklyn City R.R. v. N. Y. St. Bd. of Tax Commissioners, 199 U. S. 48 (1905). For some other examples of strict construction see *Erie Ry. v. Pa.*, 21 Wall. 492 (1874); *Schurz v. Cook*, 148 U. S. 397 (1893); *Savannah, Thunderbolt & Isle of Hope Ry. v. Savannah*, 198 U. S. 392 (1905); *Okla. Ry. v. Severns Paving Co.*, 251 U. S. 104 (1919); *Roberts & Schaefer Co. v. Emmerson*, 271 U. S. 50 (1926).

⁶³ 15 Wall. 300 (1872).

⁶⁴ *Ibid.*, pp. 300, 320. Justices Davis, Miller, Clifford, and Hunt dissented.

⁶⁵ *North Missouri R.R. v. Maguire*, 20 Wall. 46, 61 (1873).

⁶⁶ *Clement National Bank v. Vermont*, 231 U. S. 120 (1913); *Kehrer v.*

The usual holding has been that a transfer or inheritance tax does not impair the obligation of contract between contracting persons.⁶⁷ Indeed this was an unexceptional generalization until the recent case of *Coolidge v. Long*.⁶⁸ There the Court held unconstitutional a Massachusetts inheritance tax passed after the creation of a trust under which the settlors received the income from the property for life, the principal to be divided among the heirs after their death. Although the principal discussion was under the due process clause Justice Butler could not refrain from affirming that the tax impaired the contractual obligation contained in the deed of trust. Justice Roberts, with whom Justices Holmes, Brandeis, and Stone concurred, dissented, arguing that this point of view had been rejected frequently. Certainly his attitude is in close accord with the cases just cited, whereas none of the cases cited by Justice Butler is relevant to the issue. Those relied upon by the dissenters he simply ignores.

Stewart, 197 U. S. 60 (1905); *Noble State Bank v. Haskell*, 219 U. S. 104 (1911); *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342 (1916).

⁶⁷ *Blackstone v. Miller*, 188 U. S. 189 (1903); *Chanler v. Kelsey*, 205 U. S. 466 (1907); *Moffitt v. Kelly*, 218 U. S. 400 (1910); *Bullen v. Wisconsin*, 240 U. S. 625 (1916). An earlier case, *Carpenter v. Pa.*, 17 How. 456 (1855), involved only the *ex post facto* clause.

⁶⁸ 282 U. S. 582 (1931).

CHAPTER VIII

POWERS WHICH THE STATES MAY NOT CONTRACT AWAY

EMINENT DOMAIN

THE principle that a franchise grant does not deprive the state of its power of eminent domain was clearly established in *West River Bridge v. Dix*¹ and has never been seriously questioned since that decision. Dicta repeating this principle are to be found in several cases of the next forty years,² and later decisions directly applying it, although few in numbers, are clear in effect.³ Not until 1917, however, did the Court decide a case involving an express contract not to exercise the right of eminent domain.⁴ In 1854 a hospital, located in Philadelphia, secured from the state an agreement forbidding the opening of streets or alleys through its property. The hospital agreed as a condition to make certain payments and to furnish ground for a designated street. In 1913 the city, with authorization of the state, took steps to condemn land for a street through the hospital's property. In a brief opinion, citing some of the police power cases⁵ and the cases on eminent domain previously referred to, the Court held that a state may not, by virtue of the contract clause, divest itself of this essential power of government. The question has been conclusively settled by the earlier cases, and the deliberate attempt of the state to deprive itself of this power is ineffective.

¹ 6 How. 507 (1848). *Supra*, p. 66.

² *Richmond, Fredericksburg & Potomac R.R. v. Louisa R.R.*, 13 How. 71 (1851); *Greenwood v. Freight Co.*, 105 U. S. 13 (1882); *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650 (1885).

³ *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685 (1897); *Offield v. N. Y., N. H. & H. R.R.*, 203 U. S. 372 (1906); *Cincinnati v. L. & N. R.R.*, 223 U. S. 390 (1912).

⁴ *Pennsylvania Hospital v. Philadelphia*, 245 U. S. 20 (1917).

⁵ *Infra*, pp. 203-208.

THE INALIENABLE POLICE POWER: DEVELOPMENT OF THE DOCTRINE

Not until 1878 did the Court hand down a decision explicitly based upon the principle that there are certain police or regulatory powers which the states may not contract away. For over half a century before that time, however, the state courts had been expressing that doctrine in one or another form, so that by the time it was definitely embraced by the Supreme Court it had been announced in a majority of the states. Furthermore, it appeared, at first vaguely, but by 1868 very clearly, in several of the most influential legal treatises published during the nineteenth century.

In the State Courts. The Massachusetts court in sustaining the repeal of a statute granting exemption from military service commented upon the importance to the state of the power involved and said that it was not prepared to hold that any legislature could control its successors to the extent of making it impossible for them to provide for the common defence.⁶ In upholding a city ordinance forbidding the use of certain lands as a burial ground, although by a conveyance of 1766 this was permitted, the New York court said that the city had no power to make a contract "which would control or embarrass their legislative powers or duties."⁷ The reserved right of the state to protect property and therefore to impose liability for fire caused by a locomotive was upheld in a Massachusetts case in 1849.⁸ The same principle, here applied to the statutory requirement of erecting cattle guards, was discussed at greater length by a Vermont court in *Thorpe v. Rutland, etc. R. R.*⁹ a

⁶ *Commonwealth v. Bird*, 12 Mass. 443 (1815).

⁷ *Brick Presbyterian Ch. v. N. Y.*, 5 Cowen 538, 540 (1826). The Court cited English cases where two parties enter into a contract and then an act of Parliament makes performance illegal or impossible. See *Vanderbilt v. Adams*, 7 Cowen 349 (1827); *Coates v. Mayor of New York*, 7 Cowen 585 (1827). This opinion contains a vigorous defence of the principle of the reserved regulatory power. See also *Commonwealth v. Tewksbury*, 11 Metcalf (Mass.) 55 (1846).

⁸ *Lyman v. B. & W. R.R.*, 4 Cush. 288 (1849).

⁹ 27 Vt., 140 (1854). The opinion contains a fairly extensive citation of cases.

few years later. The Court held that there had not been an express exemption from erecting cattle guards in the charter, thus implying at least some doubt whether the state could have enacted such a law if there had been an exemption. But it was clear that, in the absence of an express exemption, the state retained the police or regulatory power over such matters.

In the same year, the Michigan court, in sustaining a statute prohibiting the manufacture and traffic in intoxicating liquors, heard counsel argue that legislation of this kind cannot be forestalled by private contracts, and although not basing its decision directly on that principle, it at least commented upon it favorably.¹⁰ In an influential New York case involving a statute revoking existing liquor licenses and requiring new ones, the Court held that such licenses were not contracts, and also declared that even if the legislature had attempted to grant irrevocable licenses it could not bind subsequent legislatures; no legislature can curtail the power of its successors in matters of police regulation.¹¹

There is no need to multiply citations of decisions on the subject. The only point sought to be made here is that during the decades preceding 1878 the state courts were repeatedly enunciating the principle that there were some subjects over which the regulatory or even the repealing power of the legislatures continued in effect, regardless of previous grants by state or local authorities.¹² The content to be given to that doctrine by the Supreme Court will be considered later.

In Legal Treatises. In the discussion of impairment of contracts in the first (1826) edition of Chancellor Kent's *Commentaries on American Law* there is no mention of an in-

¹⁰ *People v. Hawley*, 3 Mich. 330 (1854). Similar in point of view is *State v. Paul*, 5 R. I. 185 (1858). See also the discussion in *Barlow v. Gregory*, 31 Conn. 261 (1863).

¹¹ *Metropolitan Bd. of Excise v. Barrie*, 34 N. Y. 657 (1866). The citation of cases, including the License Cases, 5 How. 504 (1847), is indicative of the growing number in which this issue had been in some way discussed.

¹² For other opinions of the sixties and seventies in which the principle is discussed see *Blair v. Forehand*, 100 Mass. 136 (1868); *Moore v. State*, 48 Miss. 147 (1873); *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191 (1873).

alienable police power.¹³ In a later section on personal property, after saying that it would be a violation of contract to take property for a purpose not public, Kent goes on to say that the legislature, in order to prevent injury to the public, may interdict nuisances and trades dangerous to life, health, and peace.¹⁴ In the next ten editions the same order and doctrine are repeated, with the addition, from time to time, of later state decisions. The twelfth edition, edited by the future Justice Holmes in 1873, includes in the section on the impairment of contracts a note as to what contracts are protected.¹⁵ Among others, liquor licenses are not binding contracts. In Chapter XXXIV Holmes adds another note pointing out that the power of regulating and of imposing certain burdens upon property for the purpose of protecting the "safety, comfort, or well-being of society" is now called the police power.¹⁶ He makes no attempt to treat the development exhaustively, but he does cite a number of state cases to support this power of the state.

In the first edition of Parsons' *Treatise on Contracts* the author raises the question whether the contract clause affects the power of the state to enact general police regulations to preserve the health and morals of the people.¹⁷ He finds that the authorities are not in complete agreement, but that the prevailing adjudication of the country favors the rule that general laws are not within the purview of this constitutional limitation.

The really influential treatise in this as in so many other fields of constitutional law is T. M. Cooley's *Treatise on Constitutional Limitations*.¹⁸ Cooley was not always discriminating in

¹³ Kent's *Commentaries*, I, pt. II, ch. XIX, 387. This edition was published in the year of *Brick Presbyterian Church v. New York*, 5 Cowen 538 (1826). *Supra*, p. 196.

¹⁴ Vol. II, pt. V, ch. XXXIV, 274. He cites Puffendorf and Vattel, as well as the decision of the lower court in *Coates v. Mayor of New York*. *Supra*, p. 196.

¹⁵ Vol. I, *419 n. See also the citations in Dillon, *Municipal Corporations* (1872), p. 93.

¹⁶ Vol. II, *340 n. This power, he says, has been discussed at length in Cooley's *Constitutional Limitations*.

¹⁷ T. Parsons, *Law of Contracts*, 1 ed. (1855), II, 538-39.

¹⁸ The first edition appeared in 1868.

his selection, sometimes one might justifiably say his non-selective gathering, of precedents. But he did bring together hundreds of cases indicating certain extremely important trends in the law. And in Chapter XVI he does just this under the head of "The Police Power of the States." This power, he says, is simply the general regulatory power of the state. By virtue of it the state retains the right to affect the use and enjoyment of property.¹⁹ He considers the relation of this principle to the contract clause of the national Constitution and concludes that all contracts are held subject to the regulatory power of the states.²⁰ However, the state may not "under pretence of regulation, take from the corporation any of the essential rights and privileges which the charter confers."²¹ The regulations must not be disguised attempts to amend or curtail the corporate franchise.

In the Supreme Court. It is possible that when Chief Justice Marshall remarked in *Goszler v. Georgetown*,²² "We rather think that the [municipal] corporation can not abridge its own legislative power," he had some such doctrine in mind. It seems more probable, however, that in this case, which involved the power of a city to bind itself not to alter the grade of its streets, he meant that the city could not exceed the powers granted to it by the state.²³ Certainly that is the basis of the decision.

¹⁹ He quotes with approval from the opinion of Chief Justice Shaw in the case of *Commonwealth v. Alger*, 7 Cush. (Mass.) 53, 84 (1851): "We think it is a settled principle growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this Commonwealth is . . . held subject to those general regulations which are necessary to the common good and general welfare."

²⁰ *Constitutional Limitations*, p. 574. Although a number of state decisions are cited, he seems to place particular reliance upon *Thorpe v. Rutland, etc. R.R. Co.*, 27 Vt. 140 (1854).

²¹ *Ibid.*, p. 577. He notes a few pages later that prohibitory liquor laws are not contrary to the contract clause (*ibid.*, p. 583) and apparently sees no conflict between this conclusion and the one just quoted.

²² 6 Wheat. 593, 598 (1821).

²³ The case was, however, relied upon in *Wabash R.R. Co. v. Defiance*, 167 U. S. 88, at 98 (1897), to support the principle of the inalienability of certain municipal powers.

Whether the statement quoted was intended to strengthen that holding or was a dictum anticipatory of a later development is not altogether clear.

On several occasions during the next thirty years some hint of the principle occurs in the records of the Court. In the Charles River Bridge case, for example, Greenleaf, as counsel, argued that there are certain powers essential to the public well-being which may not be bartered away.²⁴ The Court made no mention of that contention in its opinion. In 1849 a Virginia statute limiting the time within which a lottery privilege could be exercised was upheld on the analogy of a statute of limitations.²⁵ This statute was unlike the ordinary legislation affecting remedies, for it annulled a valuable privilege after the lapse of a certain number of years. And the Court at least questions whether such a franchise can be irrevocable. The suppression of nuisances is, it said, among the most important duties of government. It is a principle of the common law that the king cannot sanction a nuisance; "... without asserting that a legislative license to raise money by lotteries, cannot have the sanctity of a franchise or contract in its nature irrevocable, it cannot be denied that the limitation of such a license as the present is as much demanded by public policy, as other acts of limitation which have received the sanction of this court."²⁶

Several other indications that members of the court gave at least some consideration to the possibility of an inalienable power doctrine before 1878 may be mentioned. In 1851 counsel for a railroad, the charter of which was alleged to conflict with a previously granted exclusive franchise in a certain area, argued that a state could not bargain away its power over internal improvements.²⁷ The Court noted the contention of counsel

²⁴ 11 Pet. 420, 467 (1837).

²⁵ *Phalen v. Virginia*, 8 How. 163 (1850). The state court likewise found it possible to sustain the act without deciding whether the legislature could alter or abolish a lottery privilege. *Phalen v. Commonwealth*, 1 Rob. (Va.) 713 (1842).

²⁶ 8 How. at 168.

²⁷ *Richmond, Fredericksburg & Potomac R.R. v. Louisa R.R.*, 13 How. 71 (1851).

but found that there was no impairment of contract and therefore did not pass upon the contention.²⁸

In at least two other cases during the Civil War period, counsel contended before the Court that there are certain powers which the state may not alienate, among them the sovereign power of controlling bridges and other means of communication.²⁹ In neither case did the Court pass directly upon the contention, although it may be said to have done so in effect in the second one when it held that the act in question was invalid as an impairment of the original charter. In the *Legal Tender* cases,³⁰ which, of course, involved the validity of Congressional acts and therefore are not properly concerned with the contract clause, that clause was nevertheless referred to as it had been in *Hepburn v. Griswold*,³¹ but here we find a dictum to the effect that all contracts must be understood to be made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to defeat the legitimate governmental authority.³²

The first really clear expression of the principle came in three cases decided in 1878. The first of these was *Boyd v. Alabama*.³³ Justice Field, who wrote the opinion, first sustained the repeal of a lottery privilege by Alabama on the ground that there was no contract and therefore no impairment. He added, in what is clearly *obiter*, that the Court was not prepared to admit that one legislature could by a contract with an individual restrain the power of a subsequent legislature to regulate busi-

²⁸ Curtis, J., with whom McLean and Wayne, JJ., concurred, dissented and in doing so categorically denied the argument that the legislature may not contract away such rights.

²⁹ *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116 (1863); *The Binghampton Bridge*, 3 Wall. 51 (1865).

³⁰ 12 Wall. 457 (1871).

³¹ 8 Wall. 603 (1870).

³² 12 Wall. 457, 551 (1871). See also the remarks in the *Slaughter House Cases* in 16 Wall. 36, 62 (1873), and *Munn v. Illinois*, 94 U. S. 113 (1877). In both opinions cases and authorities are cited which help to sustain the principle of the inalienability of certain police powers.

³³ 94 U. S. 645 (1877). The opinion of the Alabama court is given in *Boyd v. State*, 46 Ala. 329 (1871).

nesses of this kind.³⁴ Later in the same year in *Beer Co. v. Massachusetts*, Justice Bradley sustained a prohibition statute on the ground that the state had, by an early reservation act, retained the right to repeal or regulate.³⁵ He then goes on to say that even in the absence of specific reservation the legislature always retains the police power, "and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. . . ." ³⁶

This doctrine was finally applied, although with some hesitation and not without dissent, in *Fertilizing Co. v. Hyde Park*.³⁷ A franchise to operate a fertilizer factory in a given place was rendered valueless by a municipal ordinance prohibiting the transportation of offal through the streets, and prohibiting the operation of such a factory within a certain distance of the limits of the town. When the factory was established the area was unsettled, but it had since become thickly populated. In his opinion sustaining the ordinance Justice Swayne reiterates the principle that all grants are to be construed in favor of the state, and argues that, since there was no express exemption from the power to abate a nuisance, the contract was made subject to the police power of the state. That it is primarily the inalienable police power doctrine, rather than the principle of strict construction, which is being relied upon seems sufficiently clear from his opinion. This contains the longest discussion of the point to be found in any Supreme Court opinion up to that time.³⁸ In a concurring opinion Justice Miller agrees

³⁴ 94 U. S. 645, 649 (1877). To support this dictum he cites *Moore v. State*, 48 Miss. 147 (1873), and *Bd. of Excise v. Barrie*, 34 N. Y. 657, 663 (1866).

³⁵ 97 U. S. 25 (1878).

³⁶ 97 U. S. 33. In support of this dictum he cites *Boyd v. Alabama*, 94 U. S. 645 (1877), where the same principle had been expressed as dictum. Cf. the opinion in *Patterson v. Kentucky*, 97 U. S. 501 (1878).

³⁷ 97 U. S. 659 (1878).

³⁸ He cites only the early New York case, *Coates v. Mayor*, 7 Cow. 585

that the contract has not been impaired, but disagrees as to the police power. If a state may bargain away its power of taxation as the Court has held (although Miller had never agreed with that doctrine),³⁹ it may make a valid and binding contract "for a limited time for the removal of a continuing nuisance from a populous city." Justice Strong, dissenting, believed both that the contract had been impaired and that the state could by contract limit the exercise of its police powers. He finds no authority to the contrary.

Within two years the minority doubts had disappeared, for in *Stone v. Mississippi*,⁴⁰ the Court unanimously sustained the repeal of a lottery franchise granted for a definite term of years. Here there was no reservation of the right to repeal and no possible construction which would warrant abolition of the grant. The only principle upon which the revocation could be justified was that of the inherent police power, and Chief Justice Waite expressed no doubts about its validity or its applicability.⁴¹

THE INALIENABLE POLICE POWER: APPLICATION OF THE DOCTRINE

Morals. The dictum in *Boyd v. Alabama* and the rule of Court in *Stone v. Mississippi* were repeated in a later case involving the repeal of a lottery grant.⁴² The dictum in *Beer Co. v. Massachusetts* is also indicative of the attitude of the Court as far as legislation of this kind is concerned. Since the period of these decisions statutes pertaining to the public morals have

(1827), *supra*, p. 196, and *Beer Co. v. Massachusetts* in support of this principle. Counsel for the plaintiff referred to Cooley's statement that under guise of regulation none of the "essential rights and privileges which the charter confers" could be taken (*Constitutional Limitations*, p. 577). The opinion makes no mention of Cooley's discussion nor of the cases cited by Cooley.

³⁹ For Justice Miller's dissenting views on the subject of tax exemptions see p. 75, n. 45, above.

⁴⁰ 101 U. S. 814 (1880).

⁴¹ For an early discussion of the principle of the reserved police power see W. W. Smith, *A Treatise on Private Corporations* (Philadelphia, 1889).

⁴² *Douglas v. Kentucky*, 168 U. S. 488 (1897).

either not run afoul the contract clause, or they have been dealt with under the principles of strict construction or the reserved right to alter or repeal, and the other constitutional cases involving morals legislation have been considered under the due process, or some other clause.⁴³

Health. The point of view of *Fertilizing Co. v. Hyde Park* was considerably extended in the *Butchers' Union* case.⁴⁴ For here the Court sustained a subsequent grant which was clearly in violation of a monopolistic franchise. In defence of its holding the Court declared that the original grant was invalid to the extent that it represented an attempt permanently to bargain away the state's power over the public health. But the later cases involving health legislation have, like those involving morals legislation, been considered under the due process clause.⁴⁵

Safety. Perhaps the clearest statement of the doctrine as applied to the safety of the community is to be found in a recent oil company case.⁴⁶ A city ordinance forbidding the storage of petroleum within three hundred feet of any dwelling was sustained on the ground that no contract had been impaired, but the Court went on to assert that if the city had attempted to make a contract limiting its power to legislate on the subject when the public welfare required, it would have been ineffective.⁴⁷ Most of the cases directly involving the public safety, like those involving the public morals and health, have been decided under the capacious due process blanket. But in many

⁴³ See Ernst Freund, *The Police Power* (1904), chs. VII-IX.

⁴⁴ "While we are not prepared to say that the legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that in regard to two subjects so embraced, it cannot, by any contract, limit the exercise of those powers to the prejudice of the general welfare. These are the *public health* and *public morals*." *Butchers' Union Slaughterhouse and Live-Stock Landing Co. v. Crescent City Co.*, 111 U. S. 746, 750 (1884).

⁴⁵ A useful survey of the cases is given in Ray A. Brown, "Police Power-Legislation for Health and Personal Safety," 42 *Harvard Law Rev.*, 866 (1929). See also Freund, *The Police Power*, ch. V.

⁴⁶ *Pierce Oil Corp. v. City of Hope*, 248 U. S. 498 (1919).

⁴⁷ See also the dicta in *Minneapolis & St. Louis Ry. v. Emmons*, 149 U. S. 364 (1893); *St. Louis & San Francisco Ry. v. Mathews*, 165 U. S. 1 (1897).

of the contract clause cases which will be considered in the next few pages, and especially in those where the use and control of the public streets is concerned, the Court does place emphasis upon the principle that public grants or other contracts may not prevent legislation intended for protection of the safety of the public.

*Use of the Streets. Atlantic Coast Line R. R. v. Goldsboro*⁴⁸ sustained an ordinance regulating the speed of trains and the time that cars could remain on a crossing, and requiring the lowering of tracks on the railroad's right of way within certain defined limits. The opinion contains an unusually emphatic statement to the effect that the contract clause cannot override the power of the state.⁴⁹ In another case involving the removal of a track from an intersection the Court said that if a contract existed allowing the road to build its track in its present location, that contract was made subject to the police power.⁵⁰ But where it permitted a city to prevent the laying of a double track for a short distance in one case,⁵¹ it refused to do so in another.⁵² Circumstances do alter cases, and in the latter the Court found that the inconvenience to the city was not enough to justify abrogation of the contract. The Court reiterated its agreement with the principle that the police power may not be bargained away; it simply concluded that there was no need to apply it here. It is especially interesting that the Court should have dis-

⁴⁸ 232 U. S. 548 (1914). The opinion contains a fairly comprehensive citation of cases.

⁴⁹ "For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its exercise. . . .

"Of course, if it appear that the regulation under criticism is not in any way designed to promote the health, comfort, safety, or welfare of the community, or that the means employed have no real and substantial relation to the avowed or ostensible purpose . . . the question arises whether the law-making body has exceeded the legitimate bounds of the police power" (*ibid.*, pp. 558, 559).

⁵⁰ *Denver & Rio Grande R.R. Co. v. Denver*, 250 U. S. 241 (1919).

⁵¹ *Baltimore v. Baltimore Trust & Guarantee Co.*, 166 U. S. 673 (1897).

⁵² *Grand Trunk Western Ry. v. South Bend*, 227 U. S. 544 (1913). Justices Hughes and Pitney dissented.

cussed this doctrine at some length in both cases, since it also found that in the first of them the state had reserved the right to alter or repeal but had not done so in the second. In a somewhat similar trio of cases involving, in two instances, the removal of grade crossings and in the third the demolition of a viaduct and the erection of a grade crossing, the Court sustained the ordinances.⁵³ In all three cases the Court relied principally upon the doctrine that certain police powers may not be surrendered by contract, although in the first it discovered a reserved right to alter or repeal. In the others there was no such reservation. The only conclusion possible is that the Court found the regulation to be a reasonable, even if an expensive, one to the railroads in all except one case. In that case the public safety and convenience were not sufficiently involved. Just two years after the South Bend ordinance requiring double tracks was turned down, the Court considered a Missouri statute providing that all railroads should construct suitable drains under their road beds to carry off surface water.⁵⁴ Justice Pitney, who had dissented in the South Bend case, here had an opportunity to give emphatic expression to his belief in the doctrine of the inalienable police power:

It is established by repeated decisions of this court that neither of these provisions of the Federal Constitution [contract, due process] has the effect of overriding the power of the State to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away and is inalienable even by express grant; and that all contract and property rights are held subject to its exercise. . . . And it is also settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of the public health, morals or safety.⁵⁵

⁵³ N. Y. & N. Eng. R.R. v. Bristol, 151 U. S. 556 (1894); Erie R.R. v. Public Utility Comms., 254 U. S. 394 (1921); New Orleans Public Service, Inc., v. New Orleans, 281 U. S. 682 (1930).

⁵⁴ Chicago & Alton R.R. v. Tranbarger, 238 U. S. 67 (1915).

⁵⁵ *Ibid.*, pp. 76-7. The learned justice here cites as authorities Lake Shore & Mich. S. Ry. v. Ohio, 173 U. S. 285 (1899); C. B. & Q. Ry. v. Drainage Comms.,

It will be noticed that in this opinion Justice Pitney includes "general welfare and prosperity" along with health and safety. This inclusion was later to be applied in the rent and mortgage moratorium cases.⁵⁶

Several cases concerning contracts between cities and railroads for building or maintaining viaducts involve similar issues. In the first the expense of providing for the repair and upkeep of a viaduct built at the joint expense of the city and railroad was imposed upon the railroad.⁵⁷ This was sustained by the Court on the ground that such a change in the contract was a valid exercise of the police power, a power not to be bargained away. The presumption exists that the parties making such contracts know that they cannot withdraw the subjects from the police power of the legislature. Another ordinance requiring a railroad to repair a viaduct was contested on the ground that the dangers sought to be avoided were created after the contract was made between the road and the city, according to which the viaduct had been constructed.⁵⁸ The Court held, however, that the ordinance was a valid police regulation. But where a city had agreed to build a crossing at its own expense on land given to it by the railroad, a subsequent order requiring the road to construct a crossing was held to impair a valid contract.⁵⁹ The Court was careful to distinguish the case just referred to, and to assert that the contract here involved did not interfere with the legitimate use of the police power, that the city had, in other words, bargained away the pecuniary element, but not the power to secure the end.⁶⁰

200 U. S. 561 (1906); *Bacon v. Walker*, 204 U. S. 311 (1907). The first involves the commerce clause, the other two the due process clause. The contract clause is involved in none of them. On the other hand the *Goldsboro* case (*supra*, p. 205), which he had previously referred to, was a contract case.

⁵⁶ *Infra*, pp. 210-13.

⁵⁷ *Chicago, B. & Q. R.R. v. Nebraska*, 170 U. S. 57 (1898).

⁵⁸ *Northern Pacific Ry. v. Duluth*, 208 U. S. 583 (1908).

⁵⁹ *Missouri, Kansas & Texas Ry. v. Oklahoma*, 271 U. S. 303 (1926).

⁶⁰ For a recent and very careful discussion of the allowable limits of the police power in similar situations but under the due process clause of the Fourteenth Amendment, see *Nashville, Chattanooga, and St. Louis Ry. v. Walters*, 294 U. S. 405 (1935).

The same principle has been applied in a group of cases to the placing of electric wires under or above the streets.⁶¹ In an early case on the subject the Court found a reserved right to alter but also said that independently of this reservation the state would have the power to regulate in the interest of public safety and convenience.⁶² In subsequent cases the inalienable police power was a sufficient basis for decisions requiring changes in the existing arrangements.⁶³

Use of Rivers. A contract between two private persons to remove a dam in a small stream, thereby leaving the stream free from obstruction, was held not to prevent the legislature from subsequently giving permission to one of them to build a dam on the river.⁶⁴ The power of the legislature over the public streams is a continuing one. "This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals."⁶⁵ The same principle, with more general application to the protection of natural resources, was invoked to sustain a statute forbidding the further diversion of water from a stream in New Jersey for use in New York.⁶⁶

⁶¹ But cf. *Los Angeles v. Los Angeles Gas & Electric Corp.*, 251 U. S. 32 (1919), in which the Court, employing the due process rather than the contract clause, declared invalid the attempt by the city to force the removal of the company's poles in order that the city might establish its own system of street lighting, on the ground that this was not an exertion of the police power but was the action of the city in its proprietary capacity.

⁶² *People ex rel. N. Y. Electric Lines Co. v. Squire*, 145 U. S. 175 (1892). See also *New Orleans Gas Light Co. v. Drainage Comm.*, 197 U. S. 453 (1905).

⁶³ *Laclede Gas Light Co. v. Murphy*, 170 U. S. 78 (1898); *Hardin-Wyandott Lighting Co. v. Upper Sandusky*, 251 U. S. 173 (1919). A statement in the latter of these cases well represents the point of view of the Court: "We cannot doubt that the danger to life and property from wires carrying high tension electric current through village streets is so great that the subject is a proper one for regulation by the exercise of the police power. . . . Any modification of its right which the company may suffer from this law, passed in a reasonable exercise of the police power, does not constitute an impairing of the obligation of its contract" (*ibid.*, p. 178).

⁶⁴ *Manigault v. Springs*, 199 U. S. 473 (1905).

⁶⁵ *Ibid.*, p. 480.

⁶⁶ *Hudson County Water Co. v. McCarter*, 209 U. S. 349 (1908).

Financial. Two Illinois statutes providing for the regulation of insurance companies, even to the extent of forbidding the issuance of new policies if the companies were found to be in an unsatisfactory financial condition, were sustained in *Chicago Life Insurance Co. v. Needles*.⁶⁷ While the Court does not use the term "police power," the acts were upheld on the ground that it is a necessary implication in every corporate grant that the corporation shall be subject to reasonable regulations which do not materially interfere with ends for which it was created. Otherwise, says Justice Harlan, such grants of privilege would be dangerous to the public welfare. And in another insurance case decided nine years later the principle applied in the *Needles* case is termed the police power of the state.⁶⁸

On the other hand, as has been pointed out in Chapter VI, the Court has refused to apply the police power doctrine to statutes or constitutional provisions abolishing monopolies,⁶⁹ always excepting slaughterhouses.⁷⁰

Rates. It has previously been indicated that the Court has not applied the principle here under consideration to rate regulation.⁷¹ To be sure it engaged in a somewhat extreme variety of strict construction of charter rights in order to conclude that the state had power to regulate rates in some of these cases, but it always refrained from holding that rate regulation is a police matter that cannot be bargained away. And it has held void a number of ordinances attempting to change street railway rates.⁷²

⁶⁷ 113 U. S. 574 (1885). ⁶⁸ *Eagle Ins. Co. v. Ohio*, 153 U. S. 446 (1894).

⁶⁹ *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650 (1885), etc. *Supra*, p. 145.

⁷⁰ *Supra*, p. 144. The Court came fairly close to applying the no-monopoly principle to railroads in *Pearsall v. Great Northern Ry.*, 161 U. S. 646 (1896). There the Court upheld the revocation of a charter power to obtain control of parallel lines before the power was exercised. As has been pointed out (*supra*, p. 140) the Court seemed very much concerned with the problem of securing a continuation of competition. It also discusses at some length the principle of the police power which may not be bargained away; without quite admitting that it was doing so, it apparently applied the effect of that principle to the problem before it. It is interesting that one of the cases cited in support of the doctrine is the early one of *Phalen v. Virginia*, 8 How. 163 (1850).

⁷¹ *Supra*, p. 134.

⁷² *Supra*, p. 137.

On the other hand, a company may not preclude the power of the state to regulate rates by entering into contracts with customers. Such contracts are made subject to the state's power to regulate in the public interest.⁷³ The same principle was applied in *Sproles v. Binford* to contracts made by motor carriers relating to the use of the highways,⁷⁴ and in *Semler v. Oregon State Board of Dental Examiners*⁷⁵ to contracts between dentists and their patients.⁷⁶

Submerged Lands. The decision in *Illinois Central Railroad v. Illinois*⁷⁷ upholding the revocation of the grant of the submerged Chicago waterfront is very closely allied to the police power decisions, but not one of them. The Court might more easily have applied the principle that certain rights may not be bargained away, relying upon the police power cases rather than upon the English and state decisions concerning the public access to waterways, had it not been for one fact. That was that it had refused, save in the cases where it believed the morals and health of the community to be directly affected, to countenance interference with monopolistic grants.⁷⁸ Evidently the Court had no desire to alter this point of view, and Justice Field's opinion contains no reference either to the police power cases or to the concept itself.

Emergency Legislation Affecting Private Contracts. The New York emergency rent legislation of the post-war years was attacked on the ground, among others, that it involved unconstitutional impairments of contracts made between landlords and tenants.⁷⁹ In both cases the Court held that such contracts are made subject to the exercise of the regulatory power of the state wherever the public welfare justifies such action. Unfor-

⁷³ *Knoxville Water Co. v. Knoxville*, 189 U. S. 434 (1903); *Portland Ry. Light & Power Co. v. R.R. Comm.*, 229 U. S. 397 (1913); *Union Dry Goods Co. v. Georgia Publ. Service Corp.*, 248 U. S. 372 (1919).

⁷⁴ 286 U. S. 374 (1932).

⁷⁵ 294 U. S. 608 (1934).

⁷⁶ See also *Henderson Co. v. Thompson*, 300 U. S. 258 (1937).

⁷⁷ 146 U. S. 387 (1892). *Supra*, p. 149.

⁷⁸ See pp. 144-46, above.

⁷⁹ *Marcus Brown Holding Co. Inc. v. Feldman*, 256 U. S. 170, 198 (1921); *Levy Leasing Co. v. Siegel*, 258 U. S. 242, 249 (1922).

tunately, the opinion of Justice Holmes in the first of the cases contains no amplification of this simple statement, and in the second Justice Clarke is content to quote that statement as declaratory of the law.

The most significant statement of the police power doctrine in recent years was made by Chief Justice Hughes in the Minnesota Moratorium case, *Home Building and Loan Association v. Blaisdell*.⁸⁰ This opinion has been considered at some length in Chapter V,⁸¹ and what has been said there need not be repeated. Of course, the doctrine was there, as in the Housing cases, applied to sustain a temporary and a conditional interference with existing contracts. But it is just as clear that the health, morals, and, in the usual sense of the word, safety, of the people were not in danger. On the other hand, it is evident that much more than the pecuniary rights of the contracting parties was involved. Wholesale foreclosures of mortgaged properties would so depress real estate values as generally to increase defaults and bring financial ruin to many persons. It is nevertheless true that the statute here before the court was similar in purpose to those which led to the adoption of the contract clause. And the shortage of a reliable supply of currency, the principal cause of and justification for the stay laws of the years preceding 1787, could not be given as an excuse for the Minnesota statute.

In applying the principle of the reserved police power to this case the Court was employing a concept not developed until long after the Constitution was adopted. Furthermore, this concept had been developed to deal with contracts to which a state was a party, that is, to public contracts, or to contracts between private persons where the subject matter of the contract was deemed to be of unusual public importance. It had been employed to justify the modification or revocation of grants to railroads and other public utilities, to insurance companies, slaughterhouses, fertilizer factories, breweries, and lottery

⁸⁰ 290 U. S. 398 (1934).

⁸¹ *Supra*, p. 109.

companies. In some of the cases not only a public grant or franchise but also contracts between the corporation and other private persons were involved. Where this was the case the Court had declared that "the right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the state."⁸² In *Hudson County Water Co. v. McCarter*,⁸³ a case involving the control of the public water supply, Justice Holmes said that "one whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject matter."⁸⁴ It has not been difficult for the Court to determine that contracts made by "businesses affected with a public interest" may stand in the way of statutes enacted for the purpose of protecting the public interest. Of if the contract, as in *Manigault v. Springs*,⁸⁵ was one between private persons, but involved control of a public waterway, it was evident that "the exigencies of the public welfare" were concerned. And in a recent case⁸⁶ involving a statute prohibiting the manufacture of carbon black from natural gas, the Court, in holding that there was no violation of the constitutional injunction against impairment of the obligation of contracts, although the statute prevented the performance of the company's contracts with producers, was sustaining a police measure designed to prevent the rapid dissipation of an important natural resource.

But in the Emergency Rent cases and in the *Blaisdell* case the contracts were what are ordinarily considered to be agreements involving only the property rights of the parties to the contracts. Under ordinary circumstances this would unquestionably have been the holding of the Court. It was not the

⁸² *Union Dry Goods Co. v. Georgia Public Service Corp.*, 248 U. S. 372, 377 (1919).

⁸³ 209 U. S. 349 (1908).

⁸⁴ *Ibid.*, p. 357. Cf. *Manigault v. Springs*, 199 U. S. 473.

⁸⁵ 199 U. S. 473 (1905).

⁸⁶ *Henderson Co. v. Thompson*, 300 U. S. 258 (1937).

nature or subject matter of the contracts, but rather the conditions of the times, which brought the contracts involved in these cases within the category of those which are subject to state restriction because they concern the welfare of many people. That the Emergency Rent and the Blaisdell cases do represent a new application of the reserved police power principle is manifest, but there is no way of determining whether the example of these decisions will be followed in later periods of crisis, although it is probable that this will be the case.⁸⁷ It is possible that similar decisions may be handed down in less critical periods but under the influence of a strong public sentiment regarding the necessity of some interference with private contracts. All that one is warranted in saying now is that these two opinions may be employed by the Court in the future to the end of developing another important addition to the doctrine of the reserved police power.

⁸⁷ For a discussion of the recent cases limiting the Blaisdell ruling see pp. 114-19, above.

CHAPTER IX

CONTRACTS BETWEEN STATES AND OTHER GOVERNMENTAL AGENCIES

IT HAS previously been pointed out that the Marshall Court, out of an excess of zeal for broadening the scope of the contract clause, held it applicable to the case of contracts between two or more states.¹ This extension was, however, short-lived, and before the Civil War contracts, or rather compacts, of this kind had come to be dealt with under the constitutional clause inserted for the purpose of empowering such agreements.² There have been, however, several other varieties of contracts between political agencies which have been enforced under the obligation of contracts clause.

Contracts between States and the National Government. The first cases in which the Court enforced contracts between the states and the central government under the contract clause involved agreements for the maintenance and imposition of tolls on the Cumberland Road.³ In these cases the Court appeared to have no doubts about extending the clause to cover such exclusively governmental contracts. Its sole concern was with the interpretation of the contracts. Since that time it has applied the contract clause on a number of occasions to such agreements, but it has also discovered a limited field within which the state is not bound.

An agreement between the United States and Ohio growing out of a grant of land to aid in the construction of canals was recognized as a valid contract in *Walsh v. Columbus, Hocking Valley & Athens R. R. Co.*⁴ However, the Court here upheld an

¹ *Green v. Biddle*, 8 Wheat. 1 (1823). *Supra*, p. 46.

² *Supra*, p. 76.

³ *Supra*, p. 77.

⁴ 176 U. S. 469 (1900). In *Tucker v. Ferguson*, 22 Wall. 527 (1874), a case involving a grant by the United States in aid of railroads, the Court said at p. 572: "The State accepted the grant subject to all the conditions prescribed.

act of Ohio providing for the later abandonment of the canal and its lease to a railroad on the ground that the object of Congress was to aid in the improvement of the means of transportation. The state was not defeating this object in providing an improved method.

Another type of agreement between the states and the national government has been that entered into at the time of the state's admission to the Union. Here it is not the contract clause but the clause giving to Congress the power to admit new states which is directly involved. Nevertheless, the Court has considered such compacts or contracts very much as if they were made subject to the contract clause, without directly invoking that clause. One of the most frequent terms of such an agreement concerned the reservation of section 16 in every township for the use of the public schools. The Court has had occasion in several cases to interpret and apply the terms of such compacts.⁵ In a case of another type it applied the agreement between the United States and Kansas regarding the separate status of the Indians living in that state.⁶ In *Stearns v. Minnesota*⁷ the Court, in sustaining an agreement involving land grants to the state, explicitly affirms the principle that such compacts may be made, and apparently likened them to compacts made between states under the constitutional clause just discussed.⁸

She thereupon became the agent and trustee of the United States. The powers and duties with which she was clothed might all have been discharged by private individuals. The characters of sovereign and trustee were united in the same party. The State did not in any wise abdicate the sovereignty by accepting the trust, but the former might be exercised to render more effectual the latter. She was in no wise fettered, except as she had agreed to fulfill all the terms and conditions which accompanied the grant. To that extent she was already bound, and anything in conflict with those conditions would be *ultra vires* and cannot be supported."

⁵ See *Cooper v. Roberts*, 18 How. 173 (1856); *Beecher v. Wetherby*, 95 U. S. 517 (1877).

⁶ *Blue Jacket v. Commrs.*, 5 Wall. 737 (1867). See especially the comment at p. 756.

⁷ 179 U. S. 223 (1900).

⁸ *Ibid.*, p. 245. See also the statements as to the validity of such compacts on pp. 249 and 253.

But if the Court has no hesitancy in enforcing a contract between the national government and the states concerning such questions as the use to be made of land, and the taxation of land granted by the former, it will not sustain a contract by which a state is denied the exercise of its sovereign, political powers. Of course, the power of taxation may seem to many to be one of the most important of these sovereign powers, but the influence of the cases on the validity of contracts of tax immunity⁹ doubtless helped to produce the holdings that a state may, at least as to lands granted by the federal government, constitutionally limit its taxing powers. Moreover, it is easy to agree that the United States as proprietor may issue lands with strings attached that may be pulled after the powers of the state are otherwise intact. Such an agreement does partake of the character of a private contract rather than one seeking to limit the future exercise of sovereign powers.¹⁰ On the other hand, an agreement by which a newly entering state is restrained for a term of years from altering the location of its capital is invalid.¹¹ This subject matter is beyond the regulatory power of Congress after a state is admitted. To hold otherwise, said the Court, would deny to the state the position of equality guaranteed to it by the Constitution.

Contracts between the States and their Political Subdivisions. Since Marshall's dictum in the Dartmouth College opinion that "the framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions adopted for internal government,"¹² it has been accepted doctrine that charters granted to areas of local government are not included within the protection of the contract clause. This applies to other types of grants besides municipal charters. A grant to operate a ferry, for example, when issued to a town has a very different constitutional standing from a similar grant to a private corporation.¹³ And although it has been many times held

⁹ See ch. VII, *supra*.

¹⁰ Cf. *Ervin v. U. S.*, 251 U. S. 41 (1919).

¹¹ *Coyle v. Smith*, 221 U. S. 559 (1911).

¹² 4 Wheat. 518, 629.

¹³ *East Hartford v. Hartford Bridge Co.*, 10 How. 511 (1850).

that a state may permanently contract away its power to tax a private person, an agreement between a state and a township by which the latter is given the right to tax a given piece of property is not a contract within the meaning of the obligation of contracts clause.¹⁴ A grant to a municipality is always subject to revocation. This was applied to a specific grant of immunity from state taxation in *Covington v. Kentucky*.¹⁵ Here the state had agreed to exempt, and had subsequently taxed, a municipal water plant. The Court, partly under the influence of certain state decisions, partly, no doubt, because of the familiar distinction made in determining the liability of the city for acts of its agents,¹⁶ appeared to believe that there might be some difference under the contract clause between property held in a governmental and that held in a proprietary capacity.¹⁷ But this distinction has been brushed aside in later cases, at least so far as litigation under the contract clause is concerned.¹⁸ In holding that a city could not secure protection under the contract clause as against a state statute providing for the payment of certain fees for the taking of water from public streams the Court simply said that this distinction did not apply.¹⁹

So far then as the rights and powers of local areas are concerned the state is not limited by the provisions of the contract

¹⁴ *Williamson v. New Jersey*, 130 U. S. 189 (1889).

¹⁵ 173 U. S. 231 (1899).

¹⁶ See *Harris v. District of Columbia*, 256 U. S. 650 (1921), and cases there cited.

¹⁷ The Court said that, in this case, if the property were held in a proprietary capacity a general reservation statute gave the state the right to repeal the exemption. If held in a governmental capacity there was no contract.

¹⁸ The distinction is still employed by the Court in taxation questions involving the problem of state instrumentalities. For example, the Court in *Helvering v. Powers*, 293 U. S. 214 (1934), upheld a federal tax on the salaries of members of the board of trustees appointed by the state to manage the Boston Elevated Railway, on the ground that the state could not withdraw sources of revenue from the federal taxing power by engaging in a business which was a "departure from usual governmental functions." See Alden L. Powell, *National Taxation of State Instrumentalities* (1936).

¹⁹ *Trenton v. New Jersey*, 262 U. S. 182, 192 (1923). Here the city had, by permission of state legislation, purchased the property and the privileges of a private company having the right of taking such water. The opinion, written by Justice Van Devanter, contains an unusually good survey of the relevant cases.

clause. To the statements made by the Court in the decisions thus far cited may be added the emphatic declaration of Justice Moody in the case of *Hunter v. Pittsburg*:

The number, nature and duration of the powers conferred upon these corporations [political subdivisions of the States] and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done conditionally, or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. . . . The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it.²⁰

In most of the cases dealing with agreements between the state and its subdivisions only the rights of public bodies are directly involved. Thus when the legislature stipulated that a county seat would be established at a given place, provided that certain sums be collected for public buildings, and later changed the location of the county seat to another city, the property values of the citizens of the former city may have been reduced, but they were at least not a party to any agreement.²¹ And when the legislature creates certain school districts, only to change them a little later and give the property of the old districts to the new ones, the private property of the residents is not immediately concerned.²² Even when a state, having empowered a county to issue bonds and to levy a tax on realty to

²⁰ 207 U. S. 161, 178-79 (1907).

²¹ *Newton v. Commissioners*, 100 U. S. 548 (1879).

²² *Atty. Gen. v. Lowrey*, 199 U. S. 233 (1905).

meet principal and interest, amends the statute to include personality within the taxing power, it does not go beyond the limits of ordinary governmental powers.²³ Perhaps slightly closer to the line is a statute providing that railroad stock subscribed for by counties, the amount required to be raised by taxes, should not rest in the county itself, as provided in an earlier act, but should be redeemable by the taxpayers in exchange for their taxes.²⁴ Again it is the control of the taxing power which is immediately involved.

But when the city has, with legislative authorization, contracted with a private water company, agreeing to allow an exemption from taxation in return for the free use of water for public purposes, we seem to be on a different ground. The Court has many times sustained grants of immunity from municipal taxation. However, a state statute, procured by the water company, requiring the city to pay for its water and the company to pay taxes was sustained on the ground that the city has no more right to claim the immunity of this contract than if it had been made with the state.²⁵ The state, having authorized the city to make the contract, could revoke the authorization.

In a similar case it held that a street railway could be excused by the state from its agreement with the city to keep the streets on which its tracks lay in repair, an agreement which was one of the conditions for the extension of the company's franchise.²⁶ If the railway had opposed the change the decision would have been otherwise, assuming that the city had the power to make such a contract. Certainly if the state had been a party to the contract, it would not have been permitted to break it without

²³ *Cape Girardeau County Court v. Hill*, 118 U. S. 68 (1886).

²⁴ *Board of Commissioners v. Lucas*, 93 U. S. 108 (1876). Justice Field, who wrote the opinion, was evidently somewhat concerned about the possibilities of state interference with private property in such cases, and he queried whether, under some circumstances, a contract between a state and a municipality might not come under the contract clause. Cf. *Essex Public Road Board v. Skinkle*, 140 U. S. 334 (1891).

²⁵ *New Orleans v. New Orleans Water Works Co.*, 142 U. S. 79 (1891).

²⁶ *Worcester v. Worcester Consolidated St. Ry.*, 196 U. S. 539 (1905).

the consent of the private corporation, unless the Court found that the change was justified under the reserved police power principle. And it would be quite incorrect to assume that the state may liberate a locality from the performance of its valid contracts with private persons by invoking the doctrine that the powers of the area are subject to state control. In many cases involving the financial obligations of cities, counties, and towns state acts altering the terms of contracts of indebtedness have been held unconstitutional.²⁷ It is settled law, the Court said in *Louisiana v. New Orleans*,²⁸ that "where a municipal corporation is authorized to contract, and to exercise the power of local taxation to meet its contractual engagements, this power must continue until the contracts are satisfied; and that it is an impairment of an obligation of the contract to destroy or lessen the means by which it can be enforced."

Public Officers. Justice Woodbury, in a remark *obiter* in the West River Bridge case, compared the position of public officers, so far as the contract clause is concerned, to municipal corporations.²⁹ A few years later, in *Butler v. Pennsylvania*,³⁰ the Court upheld a statute altering the tenure, salary, and selection of canal commissioners.³¹ Since that decision the Court has held that although an office may be abolished, its term shortened, or its compensation lowered, the state is obliged to pay for services already rendered at the rate agreed upon at the time of their performance. In doing so it has said that there is "an implied contract" to pay for services at the rate established under the law, resolution, or ordinance fixing the

²⁷ See ch. VI.

²⁸ 215 U. S. 170, 175, 176 (1909). An earlier case illustrating the same general point of view is *County of Clay v. Society for Savings*, 104 U. S. 579 (1882). Here a county had with state authorization subscribed to the stock of a railroad. The Court held that the contract between the county and the railroad was a valid one despite the subsequent adoption of a state constitution prohibiting such subscriptions.

²⁹ *West River Bridge v. Dix*, 6 How. 507, 548 (1848).

³⁰ 10 How. 402 (1851).

³¹ In *Newton v. Commissioners*, 100 U. S. 548, 559 (1880), the Court said that as to public officers "there can be no irrepealable law." See also *U. S. v. Hartwell*, 6 Wall. 385 (1868).

compensation.³² "This contract is a completed contract. Its obligation is perfect." To this extent then, and in spite of some statements to the effect that public office cannot be the subject of contract, it seems to be the ruling of the Court, a ruling sustained in a recent decision,³³ that appointment to a public office is a contract so far as the payment for services rendered before the change in a law is concerned. However, contractual status is not conferred by a state tenure law when the law does not specifically provide for that status. In a recent case on this point³⁴ the Court held that a New Jersey Teachers' Tenure Act prohibiting the board of education from reducing salaries or discharging without cause after three years' service did not confer contractual status on teachers. Hence a subsequent reduction of salaries under a statute authorizing the board of education to fix salaries for a limited period did not impair the obligation of any contract.

What has been said applies only to *public* officers, and where the state enters into a contract with a private person to perform some service, the state may not abrogate this agreement without violating the contract clause of the Constitution. In the leading case on the point, *Hall v. Wisconsin*,³⁵ the Court ruled that the position of geological commissioner was not a public office, and could not validly be abrogated by a state statute. The distinction between public and private office, or, as it is sometimes put, between public office and private employment in the state's service, is not an easy one to make. It should be pointed out, however, that the Wisconsin decisions

³² *Fisk v. Jefferson Police Jury*, 116 U. S. 131, 134 (1885). The office here involved was that of district attorney.

³³ *Robertson v. Miller*, 276 U. S. 174 (1928). Justice Butler for a unanimous Court said that "after services have been rendered by a public officer under a law specifying his compensation, there arises an implied contract under which he is entitled to have the amount so fixed, and the constitutional protection extends to such contracts just as it does to those specifically expressed" (*ibid.*, p. 179).

³⁴ *Phelps v. Board of Education*, 300 U. S. 319 (1937). Cf. *Dodge v. Board of Education*, 58 Sup. Ct. 98 (1937).

³⁵ 103 U. S. 5 (1880). The Court quoted with approval the remarks of Story, J., in the Dartmouth College opinion concerning possible limitations upon removal from public office where a contract is made. *Supra*, p. 79.

specifically recognized the latter category,³⁶ and that the statute under which the geological commissioner was appointed provided for a written contract. The point of view of *Hall v. Wisconsin* rather than that of *Phelps v. Board of Education* was followed by the majority of the Court in the most recent case dealing with the subject of the status of teachers. In *Indiana ex rel. Anderson v. Brand*³⁷ the Court passed upon the validity of an act repealing certain provisions of an earlier statute which had provided for an indefinite contract for teachers who had served under contract for five years or more. This indefinite contractual status was, under the first act, to remain in effect until succeeded by a new contract or cancelled as provided in the act.³⁸ The Indiana Supreme Court sustained the measure which repealed this act so far as township schools were concerned, but the Supreme Court of the United States overruled this decision on the ground that valid contract rights had been impaired. The earlier act was couched in the language of contract. Until the recent decision the Indiana courts had repeatedly held that the position of a teacher was not a public office but was contractual, and had afforded relief on teachers' contracts. Justice Black, dissenting, argued that the office of a teacher is not contractual, that it is based on statutory regulations, which may be changed.

It would appear that there is a fairly clear category of public offices which may not be made the subject of contract, although there is, even here, "an implied contract" to pay for services rendered. On the other hand there is a category of office which, although in state employment, is not usually regarded as being public office. Here contractual status is, if not the rule, at least frequent. In between there is an even less clearly defined group of positions which may be placed under the label "public office" or under "contractual status," depending upon the provisions

³⁶ See the cases cited in the opinion, 103 U. S. 5, at p. 9.

³⁷ 58 Sup. Ct. 443 (1938).

³⁸ The employing authority might cancel the contract for incompetency, neglect of duty, immorality, etc. The teacher might cancel under stated conditions as to time and notice.

of the state law and the interpretations given to that law by the state courts. The distinction is not entirely founded upon the nature of the office or duty, for the position of teacher in the public schools is not less public than many other offices to which contractual status is not extended. But since contracts have long been the custom in this field, and have in many states been given the sanction of law, the Court is willing to accord them the protection of the contract clause. The law must, however, be clear as to the contractual status, for the Court will not imply the existence of rights to be protected under the contract clause of the Constitution.

CHAPTER X

THE FINANCIAL OBLIGATIONS OF STATE AND LOCAL GOVERNMENTS

A PROBLEM closely related to that of tax exemption is presented by attempts on the part of states to repudiate their financial obligations. Like the power of taxation, the power to incur and to regulate the payment of indebtedness is one essential to any government. Because of the principle contained in the Eleventh Amendment, that a state may not be sued by a private person, attempts at repudiation have usually been successful. But outright repudiation has been less frequent than some indirect, partially concealed attempt to change the remedy, impose a tax on the obligation, or in some other way reduce the value of the instrument of indebtedness. It is the purpose of this chapter to present an account of the nature and results of these attempts as they have been dealt with by the Supreme Court under the contract clause.

Incurring Debt. In 1874 the Louisiana legislature passed a funding act providing for the issue of consolidated bonds which were to be exchanged for outstanding bonds and warrants at the rate of sixty cents on the dollar. The purpose of this act was to reduce the state debt (the state finances being in an unsound condition and the outstanding obligations seriously depreciated following several years of reconstruction government) and to put it on a more stable basis. A constitutional amendment declared that the new bonds should constitute a contract between each holder and the state, which the latter should not impair. Later the legislature authorized the Board of Liquidation to issue a portion of such bonds to a levee company in liquidation of a debt due under a contract. This was not one of the debts to fund which the bonds had been issued. The Court sustained an injunction restraining the board from using any of the bonds to liquidate the debt due the levee company

on the grounds that the contract had been impaired.¹ Since the holders of the outstanding obligations were induced to surrender their bonds or warrants at less than their face value in order to obtain a more secure claim, the state might not impair the contract obligation which was then entered upon. By way of dictum the Court said that it was not prepared to hold that a legislature could, without the aid of a constitutional sanction, bind itself not to create a further debt or issue more bonds. This would constitute a surrender of prerogative which might seriously affect the public safety.

Under authority of an Illinois statute the Board of Supervisors of Moultrie County voted in 1869 to subscribe \$80,000 to the stock of a railroad. By the constitution of 1870 such subscriptions were forbidden. The Court sustained the subscription on the ground that a valid contract could not constitutionally be repudiated by a constitutional provision any more than by a legislative act.² However, where the authority of a municipality to make such a donation was revoked before a contract was made the contract was invalid.³

Affecting the Obligation by Taxation. A state may not repeal a stipulated immunity of its obligations from taxation.⁴ However, a tax imposed on a franchise, measured by the net income of the corporation, including therein the income from tax exempt bonds, does not impair the contract of tax immunity.⁵ Even

¹ Board of Liquidation v. McComb, 92 U. S. 531 (1876). This was held not to be a suit against the state, nor one interfering with the official discretion vested in the state's officers. An injunction may be granted to a citizen to prevent the performance of a non-discretionary duty by a state officer when it appears that the person will sustain personal injury for which adequate compensation cannot be had at law. The state officer may not plead the protection of an unconstitutional law.

² County of Moultrie v. Rockingham Ten Cent Savings Bank, 92 U. S. 631 (1875). The plaintiff in this case was a resident of Bonn, Germany, and the fact that he was outside the taxing jurisdiction of the municipality strengthened the conviction of the majority that the city was, under the guise of a tax, simply altering the terms of the contract to his disadvantage. Justices Miller, Davis, and Field dissented.

³ Concord v. Portsmouth Savings Bank, 92 U. S. 625 (1875).

⁴ Macallen Co. v. Mass., 279 U. S. 620 (1929).

⁵ Pacific Co. v. Johnson, 285 U. S. 480 (1932). The principle announced in Macallen Co. v. Mass. is thus apparently overruled in application by the distinc-

if there is no express exemption from taxation a tax levied upon municipal bonds along with other property which provided that two per cent of the stipulated six per cent interest be retained in payment of the tax is invalid as an attempt to convert a debt bearing six per cent interest into one bearing four per cent.⁶

Withdrawing Power to Levy Taxes in Order to Meet Payments. Under authorization of several Illinois statutes a municipality issued bonds and provided for special taxes to be set aside to pay the interest thereon. A subsequent statute repealed the act giving to the local areas the power to levy these taxes. The Court held that this withdrawal of power was a nullity as far as it affected the contracts between the cities and the bondholders.⁷ It has repeatedly upheld the principle that a state may not withdraw from a local government powers necessary to carry out validly made financial obligations.⁸ This doctrine has even been applied to the case of a person performing services for a locality who had secured a judgment against it.⁹ At the time the services were performed a relatively broad power to levy taxes existed. A subsequent constitutional provision fixing maximum taxing rates, thereby preventing the county from levying taxes necessary to pay its obligations, was held to destroy

tion between taxing property *qua* property and taxing a franchise measured by net income, including that from tax immune property. See also *Flint v. Stone Tracy Co.*, 220 U. S. 107 (1910), and *Educational Films Corp. v. Ward*, 282 U. S. 379 (1930).

⁶ *Murray v. Charleston*, 96 U. S. 432 (1877). Justices Miller and Hunt dissented. They argued that the contract was made subject to the power of taxation so that the imposition and collection of a tax cannot impair its obligation. However, the ruling of the majority was followed in the case of *Hartman v. Greenhow*, 102 U. S. 672 (1880). Here a tax levied on bonds of the state to be deducted from coupons, which coupons were presented in payment of taxes by one not the owner of the bonds, was held invalid. The issue of extraterritoriality was not involved, and the *Murray* case was cited and relied upon as if that question had not been necessary to its decision. See also *Cuthbert v. Virginia*, 135 U. S. 698 (1890).

⁷ *Von Hoffman v. Quincy*, 4 Wall. 535 (1867).

⁸ *Wolff v. New Orleans*, 103 U. S. 358 (1880); *Louisiana v. Pilsbury*, 105 U. S. 278 (1881); *Ralls County Ct. v. U. S.*, 105 U. S. 733 (1881); *Nelson v. Police Jury of St. Martin's Parish*, 111 U. S. 716 (1884).

⁹ *Fisk v. Jefferson Police Jury*, 116 U. S. 131 (1885). See also *Hubert v. New Orleans*, 215 U. S. 170 (1909).

the remedy and impair the contract. Where the act which was repealed was passed after the contract was made but was in existence at the time proceedings to secure the tax levy were instituted, the repeal was also held to be an impairment of contract on the ground that rights had vested.¹⁰ In these cases we have the converse of those upholding tax exemption under the contract clause, for here the Court is requiring public bodies to levy taxes for the purpose of fulfilling its contractual obligations.

A statute of somewhat similar character, although the situation with which it was intended to deal was different, was held invalid in the recent case *W. B. Worthen Company v. Kavanaugh*.¹¹ A city had mortgaged its benefit assessments at a time when the statutes provided for speedy action against delinquent taxpayers. Later the statutes were changed so that proceedings against delinquent taxpayers were delayed. This change in the remedy the Court found to impair the contract in that it materially reduced the security for the mortgage.¹²

¹⁰ *Memphis v. U. S.*, 97 U. S. 293 (1878). See, however, *U. S. v. Memphis*, 97 U. S. 284 (1878), where the Court refused to issue mandamus to require a tax levy to pay a judgment against the same city. Here the contract on which the judgment was founded was made prior to the time when additional wards were added to the city. Then an act was passed providing that these wards should not be liable for debts incurred by the city before their annexation. Exempting the new wards impaired no obligation. If anything the annexation only gave an enlarged remedy, and this was withdrawn before any rights had vested. A restriction of the right to levy a tax to pay a judgment for damages done by a mob was held no violation of contract in *Louisiana v. Mayor of New Orleans*, 109 U. S. 285 (1883). The statute providing for reimbursement for damages caused by a mob does not constitute a contract between the city and the sufferers. Where a city was authorized to aid the construction of a railroad by a bond issue, and to levy taxes on all taxable property to meet the interest, there was no contract requiring the continuance of the same tax base. A later statute limiting the taxable property to realty was not contrary to the contract clause. *Gilman v. Sheboygan*, 2 Black 510 (1862). The Court sustained a statute broadening the tax base to include personalty on the ground that there was no contract between state and county in *Cape Girardeau v. Hill*, 118 U. S. 68 (1886). As to property exempt in a different form before judgment under contract was awarded, see *New Orleans v. Morris*, 105 U. S. 600 (1881). See also *Amy v. Shelby County Taxing District*, 114 U. S. 387 (1885), in which a statute providing for the compromising and offsetting of claims by municipalities was upheld.

¹¹ 295 U. S. 56 (1935).

¹² *Cf. Ingraham v. Hanson*, 297 U. S. 378 (1936), in which the contract rights of holders of improvement district bonds were held not impaired by a statute

The Federal Municipal Bankruptcy Act. In *Ashton v. Cameron County Water Improvement District* ¹³ a closely divided Court held invalid the attempt made by Congress in 1934 to allow bankrupt areas of local government to come to an agreement with their creditors, providing two-thirds of the creditors accepted the plan. Ordinarily a Congressional statute on the subject of bankruptcies is dealt with without reference to the contract clause. Indeed in this decision the main basis of the majority opinion appears to be the principle that the central government may not encroach upon the reserved powers of the states. But the Congressional act here in question was not self-operating. The consent of the state concerned was necessary to its effectiveness. In the Ashton case the Texas legislature had passed the requisite enabling act. Justice McReynolds, for the majority, declared that the states could not, by consent or submission, enlarge the powers of Congress.¹⁴ And since a state may not pass a law impairing the obligation of contracts, "under the form of a bankruptcy act or otherwise," she may not "accomplish the same end by granting any permission necessary to enable Congress so to do."¹⁵ Justice Cardozo, dissenting, said that "the Act does not authorize the states to impair through their own laws the obligation of existing contracts. Any interference by the states is remote and indirect. At most what they do is waive a personal privilege that they would be at liberty to claim."¹⁶ If there has been any impairment of contracts it was done by the Court acting under authority of the federal law, and there is no clause forbidding that government to enact bankruptcy laws which impair contractual obligations.¹⁷

providing for separate sale of lands sold for delinquent district taxes, where the procedure for enforcing the liens was not substantially different from that existing prior to the statute.

¹³ 298 U. S. 513 (1936).

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*, pp. 541-42. Chief Justice Hughes and Justices Brandeis and Stone concurred in this dissent.

¹⁷ In August of 1937 Congress enacted a revised Municipal Bankruptcy Law

Altering Boundaries of Municipalities. Although a state has, subject to its own constitution, the power to alter the boundaries or to dissolve areas established for the purpose of local government, it may not do so without leaving some means for fulfilling existing obligations, unless it resolves them into the body of the state and creates nothing that may be deemed a "successor." Where the area of a town has been divided among several others, they are liable for their respective share of the pre-existing debts of the town which has been dissolved.¹⁸ A Court may order a tax levy in the successor town or towns to provide payment for valid obligations.¹⁹ Even if a municipality was dissolved because it had been unlawfully organized, and a new corporation formed in its place, the bonds of the former government constitute a binding obligation upon the new one.²⁰

Changing the Remedy. One of the numerous cases, or, in this instance, series of cases, growing out of the troubled finances of the southern states in the reconstruction and post-reconstruction eras was that having to do with the Virginia coupon bonds. In 1871 the general assembly passed an act funding the indebtedness of the commonwealth and provided for the issuance of bonds with coupons attached to those holding evidences of prior indebtedness. The coupons were made receivable in payment of taxes.²¹ In 1882 an act was passed requiring hold-

which was sustained by the Court. Justices McReynolds and Butler dissenting, on April 25, 1938. *Lindsay-Strathmore Irrigation Dist. v. Bekins.* 58 Sup. Ct. 811 (1938).

¹⁸ *Mt. Pleasant v. Beckwith*, 100 U. S. 514 (1879). Where a political subdivision is abolished and no successor created in its place, there is apparently little recourse to the holder of obligations of the defunct area. The creditors' only remedy is to appeal to the legislature for relief, which legislature the courts must presume will do what is just and equitable. See *Barkley v. Board of Levee Commissioners*, 93 U. S. 258 (1876), and *Meriwether v. Garrett*, 102 U. S. 472 (1880).

¹⁹ *Graham v. Folsom*, 200 U. S. 248 (1906).

²⁰ *Shapleigh v. San Angelo*, 167 U. S. 646 (1897). Here the act reincorporating the area provided that the new corporation should be liable for the debts of its predecessor only if the voters decided to assume them. This provision was held invalid since the obligation of the old automatically passed to the new municipal corporation.

²¹ In *Hartman v. Greenhow*, 102 U. S. 672 (1880), a case decided earlier than those here discussed, these bonds were also involved.

ers of the coupons to pay in legal tender the tax assessed against them and afterward to institute proceedings to establish the validity of any coupons tendered in payment of taxes and to enforce their acceptance. A majority of the Court held that the requirement of payment in advance as a condition of the employment of the remedy is not an impairment of contract.²² The remedy given by the new act is ample to fulfill the purposes of the contract.

But in a group of cases decided three years later the Court refused to sustain the action of Virginia in declining to accept the coupons in payment of taxes.²³ In these cases the plaintiffs, instead of petitioning the state court for a mandamus to require acceptance of the coupons, as had been done by Antoni, took no action after their offer to pay taxes in coupons was rejected and their property was seized. The reasoning of the Court is clear so far as concerns the invalidity of the state's action in refusing to accept the coupons which it had contracted to accept. The distinction between the Court's ruling in the Antoni case and in the subsequent one is not so acceptable. Justice Matthews argues that the former ruling does not cover this situation because the remedy of seeking a writ of mandamus to require the tax collector to accept the coupons was in effect when the original contract was made.²⁴ In the latter case the bondholder did not seek any process against the officer but stood on his rights. By contract he was entitled to have his coupons accepted and the action of the officer was unconstitutional. Since this is sub-

²² *Antoni v. Greenhow*, 107 U. S. 769 (1882). Justices Field and Harlan dissented on what would seem to be the very reasonable ground that the new remedy, because of the expense of enforcing it, alters materially the existing contract.

²³ *Poindexter v. Greenhow*, 114 U. S. 270 (1885); *White v. Greenhow*, 114 U. S. 307 (1885); *Chaffin v. Taylor*, 114 U. S. 309 (1885); *Allen v. B. & O. R.R. Co.*, 114 U. S. 311 (1885). Justice Bradley, with whom concurred Chief Justice Waite and Justices Miller and Gray, dissented on the ground that these were suits against a state in violation of the Eleventh Amendment. The dissent is at pp. 330-38.

²⁴ 114 U. S. 270 at 299 (1885). Cf. *South Carolina v. Gaillard*, 101 U. S. 433 (1879), where a statute altering the method of proving the validity of state bank notes tendered for taxes was upheld as a mere change in remedy not impairing the contract.

stantially the argument of Justices Field and Harlan in their dissenting opinions in the *Antoni* case, the two are not easy to reconcile. The remedy employed in the earlier case was available in the latter. Furthermore, the point of view of the *Poin-dexter* case is borne out by subsequent decisions involving the Virginia coupon bonds.

After the cases decided in 1885 Virginia passed acts requiring that if the genuineness of the coupon is in issue the bond must be produced, and denying expert testimony to establish the genuineness of any paper made by machinery. Suits for taxes were allowed, and the burden was put on the defendant to show the validity of the coupons. In *McGahey v. Virginia*²⁵ these requirements were declared invalid. An act materially abridging the remedy available to the holder of the bonds, without supplying an alternative and equally efficacious remedy, impairs the obligation of contract.²⁶ A one-year statute of limitations for the bringing of suit to test the genuineness of the bonds was also held invalid on the theory that the coupons were intended to circulate freely and few persons could present them within this space of time.²⁷ The same point of view is expressed in *Seibert v. United States*²⁸ in holding unconstitutional an act requiring certain petitions before a tax could be levied to meet the interest and principal on bonds issued by a county. Since, at the time the bonds were issued, the county was authorized to levy such taxes without recourse to this procedure the change was held to be one impairing the original contract.

On the other hand in *Baltzer v. North Carolina*²⁹ the Court ruled that the authority given by the state constitution to state courts is not part of a contract. Bonds had been issued by the state in 1868 under a constitution which provided that the state Supreme Court should have jurisdiction to hear claims against the state, but that its judgment should be recommenda-

²⁵ 135 U. S. 662 (1890).

²⁶ In *Cuthbert v. Virginia*, 135 U. S. 698 (1890), a license tax, prohibitory in nature, on those offering coupons for sale was held an impairment of contract.

²⁷ *In re Brown*, 135 U. S. 701 (1890).

²⁸ 122 U. S. 284 (1887).

²⁹ 161 U. S. 240 (1896).

tory only, the legislature having final authority to pass upon and provide for the payment of such claims. A later amendment to the constitution repealed this recommendatory power of the court and provided that no debts incurred by the legislature of 1868 should be paid unless the payment was ratified by a majority of all the voters of the state. This was held to be no violation of the contract. And in *Oshkosh Waterworks Co. v. Oshkosh*³⁰ a change in the city charter requiring that claims against the city be presented to the city council before suit could be brought, and limiting the time in which it could be brought, was held to be a change of remedy, but a reasonable one not impairing the obligation of previous contracts. A change of this kind is to be distinguished from that presented in a later case where an apparently innocuous change in the method of collecting county taxes was found to be in reality a systematic attempt to prevent payment of a bonded debt.³¹ Yet another aspect of the regulation of local financial affairs by a state is presented in a case involving an Arkansas statute which provided that henceforth judgments against a county should not bear interest.³² The Court upheld this statute as applied to a previous judgment, with interest at six per cent, on the ground that the question whether interest shall accrue is one of legislative discretion and is not contractual. The interest was on the judgment and the judgment is law-given and distinct from the promise.

Denying a Remedy. It is a basic principle of American constitutional law that a state may not be sued by one of its citizens or by a citizen of another state without its own consent. A state may, therefore, repudiate its obligations and the holder be without constitutional protection if the state chooses to withdraw all

³⁰ 187 U. S. 437 (1903).

³¹ *Hendrickson v. Apperson*, 245 U. S. 105 (1917). Since on its face the only change was from a system in which a single officer collected taxes to one involving a number of collectors, it is apparent that the Court was here concerned with the purpose behind the law and the way in which it operated.

³² *Missouri & Arkansas Lumber & Mining Co. v. Greenwood District*, 249 U. S. 170 (1919).

direct remedies. Ordinarily, in such cases, a suit against the state or its officers to enforce compliance with the terms of a contract contained in the bond or other instrument of indebtedness may be dismissed as an attempt to sue the state without its consent. Of course the application of this principle is by no means so clear that the Court is always unanimous in passing upon issues of the kind. The various attitudes set forth in the Virginia Coupon opinions may be given as an illustration of this.³³ There the plaintiff was in form at least not suing the state, but suing the collector to recover his property. Yet four members of the Court believed that the suit was barred by the Eleventh Amendment. This is not the place to go into an examination of this very confusing problem of jurisdiction, but there are several cases directly involving the question of state financial obligations which illustrate some of the difficulties of bringing suit against a state.

By an Arkansas act of 1854 it was required that in any suit for the recovery of the value of bonds owed by the state the bonds must be produced in Court and filed by order of the Court to be held until the disposition of the suit. The Court held this to be valid, even as applied to a suit commenced against the state (in accordance with existing statutory permission) before the new regulations were enacted.³⁴ The earlier consent to be sued was not a contract; the latter act merely regulated Court procedure. A somewhat closer issue was presented in the leading case of *Louisiana v. Jumel*.³⁵ A revenue act of 1874 funded the indebtedness of the state, levied a tax to provide for the payment of both interest and principal, and declared the same to be a valid contract between the creditors and the state. In 1879 a new state constitution took away the power of the officers who had been empowered to carry out the

³³ *Supra*, p. 229.

³⁴ *Beers v. Arkansas*, 20 How. 527 (1858). Also *Bank of Washington v. Arkansas*, 20 How. 530 (1858).

³⁵ 107 U. S. 711 (1883). This involves the same funding act which was before the Court in *Board of Liquidation v. McComb*, 92 U. S. 531 (1876). *Supra*, p. 225.

act of 1874. The Supreme Court refused to entertain a suit against state officers for the purpose of enforcing the contract. Such officers have no powers except those given by state law, and the state may not be sued without its consent. Justices Field and Harlan dissented on the ground that the state could not thus escape a flagrant violation of the contract clause. *Hagood v. Southern*,³⁶ decided three years later, involved an issue similar to that in the Virginia Coupon cases. Scrip issued by South Carolina and given in place of bonds surrendered to the state was made receivable for taxes. Later the scrip was declared not receivable in payment of taxes. The Court held that the issue was one between the state and the bondholders and the suit here instituted against state officers was one against the state. As such it could not be entertained without violating the Eleventh Amendment.

Repudiation of Warrants, Notes, or Coupons Receivable for Taxes and Debts Owed to the State. The shortage of currency in the newer western states during the period between the expiration of the charter of the second Bank of the United States and the Civil War led to a number of legislative devices designed to deal with the problem. The Court in *Briscoe v. Bank of Kentucky*³⁷ sustained the issue of notes by banks owned by the states. Such a bank was chartered by Arkansas in 1836. Its notes were receivable for all debts due the state. Later this section of the act incorporating the bank was repealed. The Court said that this section could be repealed so far as concerns the issuance of additional notes, but it could not affect the status of notes already issued without impairing the obligation of contracts.³⁸

A Texas statute permitted treasury warrants to be given to the state for payment of interest on bonds issued by a railroad

³⁶ 117 U. S. 52 (1886). Justices Field and Harlan adhered to the views expressed in their previous dissent, but admitted that the holding in that case required the decision reached by the majority in this cause.

³⁷ 11 Pet. 257 (1837).

³⁸ *Woodruff v. Trapnall*, 10 How. 190 (1850). Justices Catron, Daniel, Nelson, and Grier dissented on the ground that no contract existed. The principle of this case was applied to a Tennessee act in *Furman v. Nichol*, 8 Wall. 44 (1869).

and held by the state. After some had been received the statute was repealed and the railroad held liable for back interest paid in the warrants. This the Court held to be a violation of the earlier contract.³⁹ However, in *Hucless v. Childrey*,⁴⁰ one of the later cases dealing with the Virginia Coupon legislation, it was held no impairment of contract to require that a liquor license be paid in lawful money and not in coupons that were receivable for taxes, on the ground that such licenses are as much for the purpose of regulating this particular form of business as for that of raising revenue.

In still another of this group of cases, *Vashon v. Greenhow*,⁴¹ it was held that the history of legislation in regard to school taxes showed that coupons were never receivable for them. These decisions assume the validity of the original contract but rest upon a very fine-drawn interpretation of it. The fineness of the distinctions made in these cases, and especially the first, is apparent when they are compared with the slightly earlier case of *Royall v. Virginia*.⁴² There the Court had unanimously held invalid the refusal of the state to accept the coupons in payment of a license fee required of a lawyer before engaging in the practice of his profession.

But where the treasury notes were issued in aid of the rebellion (as by Mississippi in 1861) the later refusal of the state to accept them is not an impairment of contract since they were invalid when issued.⁴³ Over a strong dissent the majority of the Court refused to apply this principle to notes issued by a Tennessee bank during the war.⁴⁴

³⁹ *Houston & T. C. R.R. v. Texas*, 177 U. S. 66 (1900).

⁴⁰ 135 U. S. 709 (1890).

⁴¹ 135 U. S. 713 (1890).

⁴² 116 U. S. 572 (1886). Reaffirmed in *Royall v. Virginia*, 121 U. S. 102 (1887). See also *Sands v. Edmunds*, 116 U. S. 585 (1886).

⁴³ *Taylor v. Thomas*, 22 Wall. 479 (1875).

⁴⁴ *Keith v. Clark*, 97 U. S. 454 (1878). The bank's charter made the notes receivable for taxes. After the war the notes issued in that period were declared invalid by the legislature. Chief Justice Waite and Justices Bradley and Harlan dissented on the ground that the bills of the bank were in fact issued in aid of the rebellion.

CHAPTER XI

THE IMPAIRMENT OF CONTRACT BY JUDICIAL DECISION

Early Cases in Which There is a Change of Ruling by the State Court. In *Gelpcke v. Dubuque*¹ the Court refused to follow the most recent state court rulings as to the validity of certain municipal bonds. Instead, it held that where the state law was settled at the time the bonds were issued, they could not thereafter be held invalid, even on the basis of a changed interpretation of the state constitution. As Professor Thayer pointed out, the Court, while clearly indicating its approval of the earlier decisions, refused to go into the question whether the earlier decisions were correct, or to announce any rule which would require them to follow the decisions of the state courts.² And in a group of cases decided within the next few years the Gelpcke rule was still further extended. In *Havemeyer v. Iowa County*³ the Court ruled that where the Wisconsin courts had, before a contract was made, so interpreted a statute as to give validity to the contract, its subsequent change of interpretation could not impair the contract. In view of the statement frequently made by the Court, that *Gelpcke v. Dubuque* and the other cases of the same kind are not obligation of contract cases, because no law has been passed impairing the obligation of contracts, the explanation given by Justice Swayne in *Butz v. Muscatine*⁴ is especially interesting. After pointing out that, according to the rule in *Swift v. Tyson*,⁵ "this court construes

¹ 1 Wall. 175 (1864). *Supra*, p. 80.

² James Bradley Thayer, "Gelpcke v. Dubuque; Federal and State Decisions," 4 *Harvard Law Rev.*, 311 (1891), and *Legal Essays*, p. 141. For an excellent analysis of the cases on this subject to 1909 see W. F. Dodd, "Impairment of the Obligation of Contract by State Decisions," 4 *Illinois Law Rev.*, 155, 327 (1909).

³ 3 Wall. 294 (1866). See also *Thompson v. Lee County*, 3 Wall. 327 (1866); *Mitchell v. Burlington*, 4 Wall. 270 (1867); *Larned v. Burlington*, 4 Wall. 275 (1867); *Kenosha v. Lamson*, 9 Wall. 477 (1870); *Olcott v. Supervisors of Fond du Lac*, 16 Wall. 678 (1873).

⁴ 8 Wall. 575 (1869).

⁵ 16 Pet. 1 (1842).

all contracts brought before it for consideration, and in doing so its action is independent of that of the state courts, which may have exercised their judgment upon the same subject," he says:

The fact that one of the elements in the case is a statute of the state does not affect the legal result. We are of the opinion that under the statutes of Iowa, in force when the contract was made, the relator is entitled to the remedy he asks, and that *this right can no more be taken away by subsequent judicial decisions than by subsequent legislation*. It is as much within the sphere of our power and duties to protect the contract from the former as from the latter, and we are no more concluded by the one than the other. We cannot in any other way give effect to the contract of the parties as we understand it.⁶

And in *Douglass v. Pike County*⁷ Chief Justice Waite said, "The true rule is to give a change of judicial construction in respect to a statute, the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive."

Contracts Rendered Invalid by a State Court Decision When There Has Been No Previous Ruling. These statements seem to represent a reasonably logical expansion of the Gelpcke rule. But does that case apply when the state court declares a statute under which contracts have been made to be invalid, and the statute has not previously been held to be constitutional by any court? It is difficult at the present time to see how it does, but the Court applied that principle in *Pine Grove Township v. Talcott*.⁸ Here bonds issued by a township in aid of a railroad were held invalid by the Michigan Supreme Court on the ground that the statute violated the state constitution since the legislature could authorize no tax except for a public purpose.⁹ There

⁶ 8 Wall. at 584. Italics not in the original.

⁷ 101 U. S. 677 (1880).

⁸ 19 Wall. 666 (1874).

⁹ The similarity of this rule to that laid down by the Supreme Court in *Loan Association v. Topeka*, 20 Wall. 655 (1875), is apparent. But where the Supreme Court held, in the *Topeka* case, that bonds issued in aid of a manufacturing enterprise were not for a public purpose, it held in the *Talcott* case that aid of a railroad was public in character. The work of the railroad "was public, as much

had been no previous decision interpreting the state constitution on the point. Nevertheless the Supreme Court, saying that the Michigan court's interpretation of the Michigan constitution was "not satisfactory to our minds," held the state law to be constitutional and the bonds to be valid. "The general understanding of the legal profession throughout the country is believed to have been that they were valid. The National Constitution forbids the states to pass laws impairing the obligation of contracts. In cases properly brought before us that end can be accomplished unwarrantably no more by judicial decisions than by legislation."¹⁰

It is easier to believe that the bondholders were being given justice than that the Supreme Court has invariably adhered to its principle that a judicial decision cannot impair the obligation of contracts under the Constitution. Of course, the point of view of the Court is that it is exercising its right and duty to use its own judgment, as it always does, "in reference to the doctrines of commercial law and general jurisprudence" when the law is unsettled.¹¹ The Supreme Court will in doubtful cases lean toward the interpretation of the state courts¹² but it will, wherever necessary, exercise the power vested in the federal courts, a body of "independent tribunals" intended to be "unaffected by local prejudices and sectional views." If the contract clause of the Constitution were not made to play so important a rôle in the discussion it would be easier to agree that this is what the Court was doing.

Nor has the Court applied this rule only where contracts to which states or local governments are parties were involved. In *Great Southern Fire Proof Hotel Co. v. Jones*¹³ the Court

so as if it were to be constructed by the State." It is an enterprise which the state itself might engage in.

¹⁰ 19 Wall. at p. 678. See also *Anderson v. Santa Anna*, 116 U. S. 356 (1886); *Folsom v. Township Ninety six*, 159 U. S. 611 (1895); *Stanly County v. Coler*, 190 U. S. 437 (1903).

¹¹ See the opinion in *Burgess v. Seligman*, 107 U. S. 20, 33 (1883).

¹² See, e.g., *Zane v. Hamilton County*, 189 U. S. 370 (1903).

¹³ 193 U. S. 532 (1904).

refused to follow decisions of the Ohio courts holding an act to be contrary to the Ohio constitution. Here a contract between private persons had been made before the state decisions had been given. Upon independent investigation the Supreme Court ruled that the act was not invalid under the state constitution. Had the decision by the state court as to the invalidity of the statute been given before the contract was made that ruling would have been part of the law of the state under which the contract was made, but, coming after the contract, it could not affect its validity.

Cases Coming from the State Courts. The preceding cases came to the Supreme Court from the lower federal courts, in which event the Court has refused to follow the latest decision of a state tribunal, if to do so would impair the validity of a contract which, by the state court's interpretation of the law then in existence, was valid when made. This, the rule of *Gelpcke v. Dubuque*, as extended in subsequent decisions, has been held to apply also to decisions of state courts involving a statutory interpretation rendered after the contract was formed, even though there was no previous judicial interpretation of the state constitution or statutes. Where state court decisions involving contracts are sought to be reviewed directly by writ of error to the state court, the attitude of the Federal Supreme Court has been different. The distinction was clearly stated in *Bacon v. Texas*.¹⁴ Here the Court ruled that in cases coming up from the lower federal courts it would be free to disregard changes in state court interpretations of state constitutions and laws when the later decision served to render invalid a contract which was valid when made. As regards appeals from the state courts, however, the Court went on to explain its position as follows:

This court has no jurisdiction to review a judgment of a state court made under precisely the same circumstances, although such state court thereby decided that the state legislation was void which it had prior thereto held to be valid. It has no such jurisdiction, because of the absence of any legislation subsequent to the issuing of the bonds

¹⁴ 163 U. S. 207, 221-22 (1896).

which had been given effect to by the state court. In other words, we have no jurisdiction, because a state court changes its views in regard to the proper construction of its state statute, although the effect of such judgment may be to impair the value of what the state court had before that held to be a valid contract. When a case is brought in the United States court, comity generally requires of this court that in matters relating to the proper construction of the laws and constitution of its own state, this court should follow the decisions of the state court; yet in exceptional cases, such as *Gelpcke* and others, *supra*, it is seen that this court has refused to be bound by such rule, and has refused to follow the later decisions of the state court. A writ of error has been dismissed in this court (*Mississippi and M. R. Co. v. McClure*, 10 Wall. 511) where the judgment sought to be reviewed was that of a state court, holding that certain bonds were void upon precisely the same facts that this court in the *Gelpcke* case held were valid. There was no subsequent legislative act impairing the obligation, and hence this court had no jurisdiction to review the judgment of the state court.

This principle has been frequently reasserted.¹⁵ However, the Court has upon occasion reviewed the decision of a state court upon writ of error to that court, when it would appear that a subsequent statute was found to be involved only because the Supreme Court felt it necessary to maintain its consistency. *Muhlker v. New York and Harlem Railroad Co.*¹⁶ is such a case. The Supreme Court of New York, pursuant to a ruling of the New York Court of Appeals, held that a property owner on Park Avenue was entitled to no compensation for deprivation of his easements of light and air caused by the building of an elevated railroad in place of a partially submerged railroad at the street level. The earlier New York ruling had been that a person in this situation was entitled to recover compensation. The plaintiff here asserted that his contract rights were impaired, that a statute of 1892 as interpreted by the later decisions of the state court took the property without compensation. This statute provided for erecting the elevated structure and

¹⁵ See *Moore-Mansfield Coast Co. v. Electrical Installation Co.*, 234 U. S. 619 (1914); *Cleveland and Pittsburgh R.R. Co. v. City of Cleveland*, 235 U. S. 50 (1914), and cases therein cited.

¹⁶ 197 U. S. 544 (1905).

had no other relation to the contract, and it seems to have been brought in by the Supreme Court of the United States in order to justify taking jurisdiction under the contract clause. The Court thereupon overruled the later holding and decided that the owner was protected by the contract clause. If any contract existed that an elevated structure could not be erected without compensation, it was based upon the earlier state court decisions.¹⁷ This case was affirmed and applied in *Birrell v. New York and Harlem Railroad Co.*¹⁸ Two years later the Court took jurisdiction of a similar cause, but found that the plaintiff was not entitled to recover damages because under the earlier state decisions there was no implied contract not to use the street for additional structures to be used for *public* purposes (here an elevated viaduct to be used as a part of the public street).¹⁹

These cases represent extreme instances of the attitude of the Court toward obligation of contract cases coming up by writ of error to the highest state court having jurisdiction. And of recent years the Court has been more insistent that a state statute or constitution must be involved.²⁰ It would seem that the Court could much more satisfactorily have defended its action in almost all of the cases considered in this chapter if it had avoided any reliance upon the contract clause. Instead, it should have asserted its right, in cases coming from the lower federal courts, to exercise its own judgment as to the construction of state constitutions and statutes. This is apparently the tendency in

¹⁷ Justice Holmes, dissenting, said that "we are asked to extend to the present case the principle of *Gelpcke v. Dubuque*, 1 Wall. 175, and *Louisiana v. Pillsbury*, 105 U. S. 278, as to public bonds bought on the faith of a decision that they were constitutionally issued. That seems to me a great, unwarranted, and undesirable extension of a doctrine which it took this court a good while to explain" (*ibid.*, p. 573). Chief Justice Fuller and Justices White and Peckham concurred in this dissent.

¹⁸ 198 U. S. 390 (1905).

¹⁹ *Sauer v. New York*, 206 U. S. 536 (1907). Justices McKenna and Day dissented on the ground that this situation was covered by the *Muhlker* and *Birrell* decisions.

²⁰ When the due process clause is invoked it is of course unnecessary to plead deprivation of property by a state law. See *Dodd*, 4 *Illinois Law Rev.*, 333 *et seq.*; and note "Constitutionality of Judicial Decisions in their Substantive Law Aspect under the Due Process Clause," 28 *Columbia Law Rev.*, 619 (1928).

the more recent cases. In *Tidal Oil Co. v. Flanagan*,²¹ in referring to the Gelpcke and other cases following it, Chief Justice Taft said that the Court had not then based its conclusion on the contract clause, "but on the state law as they determined it, which in diverse citizenship cases, under the third article of the Federal Constitution they were empowered to do."²² It is rather more than doubtful whether the Court really did this, for in many of these cases the Court did not attempt to determine the state law excepting to rule that a contract valid when made, according to state court decisions, could not be impaired by a subsequent change of interpretation by the state courts. At any rate, it seems improbable that in the future the contract clause will be advanced by the Court as the basis for a ruling unless it can be shown that an act of the legislative branch of a state government is involved.

²¹ 263 U. S. 444 (1924). See also the frequently quoted statement of Justice Gray in *Central Land Co. v. Laidley*, 159 U. S. 103, 109-10 (1895).

²² 263 U. S. 452 (1924). For a view extremely critical of the Court's actions in these cases see L. B. Boudin, "Stare Decisis, State Constitutions and Impairing the Obligation of Contract by Judicial Decisions," 11 *New York University Law Quarterly Rev.*, 31, 207 (1933).

CHAPTER XII

CONCLUSION: THE PROTECTION OF VESTED RIGHTS IN A DEMOCRACY

HAD the Supreme Court adhered to the intentions of the Framers the contract clause would never have attained a position of great legal or economic importance. Most of the members of the Federal Convention who expressed any opinions at all about this part of the Constitution apparently thought of it as a limitation upon the monetary powers of the states. It has been of no effect in this respect because it was not needed. A preceding clause of the same section prohibited the states from issuing money and from giving to paper currency of the kind resorted to during the Confederation the quality of legal tender. Some members of the Convention believed that the contract clause would serve to protect private contracts against stay laws and other statutory devices favorable to debtors. Slightly more than one-tenth of the cases in which the clause has been considered by the Court have had to do with purely private contracts, and a good proportion of this small number have had little relation to the fears of the Fathers.¹ The significance of the clause is the product not of the Constitution but of a process of judicial interpretation.

The Supreme Court history of the clause begins with Marshall's famous decision in 1810 in which he held that a state may not, consistent with this portion of the Constitution, rescind a land grant. But before that time there had been important statements concerning the meaning of the clause which deprive Marshall of the full credit due an innovator. Even before the Convention of 1787 James Wilson and Thomas Paine had asserted that a state could not lawfully withdraw a charter.

¹ The Court has held state statutes to be in conflict with the contract clause in one hundred and thirty-four cases. In fourteen of these cases the statutes involved regulated the debtor-creditor relation in a fashion at least similar to the stay, installment, and commodity payment acts of the years preceding 1787.

This view was not, of course, linked to any specific constitutional provision. Nor did either Wilson or Paine later express the opinion that the contract clause applied to situations of the kind. The belief held by some that Wilson was the author of the clause rests entirely upon assumption. He did not propose the clause in the Convention, he was not a member of the committee on style which phrased it, and he seems never to have regarded it as of great importance. The similarity of the words used in the clause to the Roman Law terminology is insufficient evidence that this Scottish-trained lawyer was responsible for its final form. In 1795, eight years after the Convention adjourned and fifteen years before the decision of *Fletcher v. Peck*, Justice Paterson expressed in a circuit court opinion an interpretation of the clause definitely anticipatory of the Marshall holding. Paterson had been an active member of the Convention. In the next year a similar view was stated by Alexander Hamilton, who as an attorney in private practice in New York was asked for his opinion concerning the validity of the Georgia act repealing the land grant. His opinion was published in pamphlet form. Hamilton was neither a very active nor an entirely representative member of the Convention, but he exercised an almost dominant influence upon the thinking of Marshall. In a number of speeches made in Congress during the debate over the question of paying the Yazoo land claims the point of view of Paterson and Hamilton was repeated, although the authority of their names was not appealed to.

These various assertions, together with a few less clear statements, did not constitute a "trend" to which Marshall was bound to give effect in *Fletcher v. Peck*. He was not even certain, as his opinion shows, that the contract clause applied to contracts to which states are parties, but he believed that to be a desirable interpretation, and he was successful in having it adopted by the Court. At first the contract clause was an insufficient ground for holding states to their agreements, and resort was also made to the immutable principles of right and justice, and the "fundamental laws of every free government."

Very soon the clause had come to include a considerable portion of the laws of nature, and could be employed without specific additional reference to those less tangible authorities. In a series of epoch-making decisions the Marshall Court applied the clause to public land grants, to tax exemptions, to corporate charters, and to bankruptcy statutes. Only the last of these involved private contracts, and it is doubtful whether the fathers were opposed to state legislation of this kind. In only one case were Marshall's views rejected by the Court. In *Ogden v. Saunders*, decided in 1827, a bare majority of the Court held that the clause did not prohibit the passage of a bankruptcy statute with a prospective rather than a retrospective application. Marshall was unable to achieve everything that he wished under the contract clause, but his great majority opinions laid the foundation for the future growth of this branch of the law of the Constitution.

Contrary to the usually accepted view of the thirty-year period following Marshall's death, there was in those decades no break with the Marshall tradition. Chief Justice Taney, usually on the sole evidence of the Charles River Bridge decision, has frequently been said to be the leader of the democratic reaction against the vested rights principles of his predecessor. Actually he was, in many respects, an old-line Federalist whose regard for the rights of private property was almost as great as Marshall's. He was opposed to the Bank of the United States; he was suspicious of some of the activities of state banks. But like most other leading Democrats of his time he had no sympathy with legislation interfering with what he regarded as legitimate property rights. He accepted without question the philosophy upon which Marshall's contract doctrine rested, and the major principles of that doctrine he unhesitatingly applied. During his years as Chief Justice the number of contract clause cases increased rapidly, and not only was the proportion of those cases in which state acts were declared unconstitutional almost identical with that in the Marshall period, but the rules of contract clause law, inaugurated by Marshall, were so repeatedly ex-

pressed, and in some instances extended, that they were given the authority of fundamental constitutional principles.

Since 1865 the additions to the law of the contract clause have been interstitial, rather than structural. Only a small proportion of the total number of cases dealing with the clause had been decided up to that time, but the doctrines which give it its significance — that it includes contracts to which a state is a party, that a corporate charter is a contract, that a contract for tax exemption is protected by it, that it prohibits retrospective bankruptcy or stay laws — had been enunciated and applied. The great extension of constitutional safeguards to property rights since that time has come in terms of due process of law. Because this clause was made a more inclusive one it has come to take the place once held by the contract clause. Due process has been an increasingly useful instrument for the protection of property rights not only because it has been tremendously expanded but also because it has never been subjected to the restrictions built up by the Court about the contract clause.

With one exception these restrictive doctrines, like the principles extending the applicability of the contract clause, were the work of the Marshall and Taney years. The most important restriction of all was set forth in *Ogden v. Saunders* in 1827 when the majority of the Court refused to give a prospective meaning to the clause. Had Marshall been able to convince one additional justice of the correctness of his point of view the clause would probably have been expanded into a liberty of contract conception, a guarantee of the right to enter into contracts without legislative interference, past as well as future. In other words, it might have come to be a due process clause, as that clause has been interpreted since the eighteen-nineties. So far as bankruptcy legislation, the matter involved in *Ogden v. Saunders*, is concerned, this would undoubtedly have led to a more inclusive federal statute, since there is no contract clause limitation upon the acts of Congress. But the restrictive scope of the clause in respect to state regulation of corporations would have been immeasurably extended. One may guess that the

Court after 1835 might have felt it expedient to limit Marshall's ruling by a more rigorous application of the principles of the reserved right to amend or repeal (although this doctrine could have been rendered innocuous under the principle of prospective application as set forth in Marshall's dissent) and of strict construction. But, even so, the breadth of the clause might have made the expansion of due process superfluous.

If the greatest of limitations to the inclusiveness of the contract clause was a product of the Marshall period, although Marshall himself was on the dissenting side, the second greatest, the reserved right to alter or amend, was suggested by Story in his Dartmouth College opinion and was repeated by the Taney court. The general adoption of such reservation clauses in state constitutions and statutes did a great deal to pave the way for the demand among business interests for development of the due process concept into an effective weapon of defence against legislative activity. When the principle of strict construction of public grants, a principle several times stated by the Marshall Court, and strengthened by Taney in the Charles River Bridge case, was added to the previously enunciated rules, the major limitations upon the contract clause had all been devised. Since the Civil War there has been but one addition of general applicability — the conception of the inalienable police power. This doctrine does represent a restriction upon the Marshall doctrine, for Marshall did not acknowledge that there are some public powers which may not be made the basis of contract. Had he done so, the case of *New Jersey v. Wilson*, involving as it did the basic power of taxation, might have been decided otherwise. The ruling that the power to protect the health, morals, and general welfare of its citizens may not be bargained away stems from the same source as the principle of strict construction — from a latter-day reluctance to accept all of the consequences which follow from a generous application of the early Marshall doctrine. Although the reserved police power conception has been applied to a number of interesting situations, few of the cases in which it has been invoked have dealt with economic

issues of any considerable magnitude. For the most part they have involved relatively local problems concerning the regulation of streets, the location of railroad tracks, fertilizer plants, or gasoline storage tanks, and the continued existence of lotteries. That it is capable of a broader application is evident from the Emergency Rent and the Blaisdell cases, but the extent to which these decisions will be influential in future periods of crisis legislation remains uncertain.

So far as contracts between private persons are concerned the contract clause has been of secondary importance. It has been pointed out that there have been no cases under it involving legal tender or other monetary legislation. The number having to do with stay laws or other forms of debtors' relief legislation has not been large. There were several cases in the eighteen-forties in which legislation enacted in order to give retrospective relief to mortgage creditors in the depression years following the panic of 1837 was held to be unconstitutional by the Taney Court. The rules then enunciated were not often applied and remained virtually unchanged until the Blaisdell case, involving the Minnesota moratorium statute, in 1934. This decision at first seemed to reflect a considerable alteration in the Court's attitude toward legislation in aid of debtors caught in the downswing of the economic cycle. A number of recent decisions indicate that the Court is unwilling to carry the Blaisdell doctrine as far as many persons expected. Not all statutes for the purpose of aiding distressed debtors but those only which carefully safeguard the interests of creditors appear likely to receive the Court's approval. And this recent group of cases is the first group in a century to show any real correlation between depression legislation and litigation under the contract clause.

So far as state bankruptcy legislation is concerned the general rules were set forth by the Marshall Court in *Sturges v. Crowninshield* and *Ogden v. Saunders*, and there has been little need to restate them. Most of the other cases involving private contracts grew out of the Civil War or the reconstruction era. They dealt with legislation of the southern states during the

War, or with carpetbag or counter-carpetbag statutes. In either instance the influence of the clause was temporary. The rarity of contract clause cases having to do with private contracts is clearly shown by the fact that during the thirty-year period before the recent depression legislation began to reach the Court there was only one case in which a statute of this kind was held unconstitutional.

During the first half of the nineteenth century the desire of the Court to give the utmost breadth of interpretation to the clause led to its application to certain kinds of contracts between political units. Its application to interstate compacts was unnecessary and shortlived, for another clause in the same section of the Constitution makes provision for them. But it was unhesitatingly applied to a variety of agreements between the states and the national government, although cases of this kind have been few in number and of rather limited effect. From the first the Court assumed that the clause did not apply to contracts between the states and cities or other units of local government. And, with some exceptions, the clause has not served to limit the freedom of the state in dealing with its public officers.

On the other hand it has been frequently invoked to prevent a state or local area of government from attempting to evade its contractual financial obligations. Because of the Eleventh Amendment, cases of outright repudiation by the states have ordinarily not been brought to the Court. Many less direct attempts to alter the terms of its instruments of indebtedness, or in some way to restrict the means for their payment, have met with the Court's veto. It was in a case involving a local bond issue that the Court refused to follow the latest state court decision, and held that if the bonds were, under the existing law of the state, valid when issued, they could not be held invalid by a change in the state court's interpretation of the state constitution. In this case, *Gelpcke v. Dubuque*, the Supreme Court did not assert that a state court decision was a law which could impair the obligation of contracts. But in certain of the cases in which the Gelpcke rule was applied and extended it came very

close indeed to making such an assumption the basis for its decision. These cases could and should have been decided without reference to the contract clause, and of recent years the Court has attempted to avoid that clause in cases of the kind.

The contract clause is of first-rate importance in our economic history largely because of the protection given under it to the corporate form of business enterprise. The economic results of the Dartmouth College decision, taken with the previous ruling in *New Jersey v. Wilson* sustaining a contract for tax exemption, are impossible to measure with accuracy, but the significance of those rulings is difficult to exaggerate. During Marshall's lifetime, to be sure, they had little tangible effect, so far as the decisions of the Court are concerned. But with the rapid growth of the corporate form, combined with generous grants by states and municipalities to corporations, the implications of Marshall's doctrine became manifest. During the Taney period his principles were invoked principally to protect grants of tax immunity to state-chartered banks. In the reconstruction years the tax exemption cases continue to predominate. After 1873, however, the many cases involving the regulation of railroads and other public utilities are indicative both of the rapid expansion of corporations of this kind and of the limitations imposed by the Court in the name of the contract clause upon the attempts of states to regulate their activities.

Franchises obtained through the influence of political bosses, by bribery of legislators, or by perfectly open and honest methods were given the same measure of protection by the Court. As against a grant which was specific in its terms, the Court would give no relief, unless the state had in this grant or in a previous constitutional or statutory provision reserved the power to alter or amend. A grant for nine hundred and ninety-nine years or in perpetuity was given the same treatment accorded one for a short term.

There is no need here to repeat the summary given in Chapter IV, but it may be pointed out that relatively few of these cases involve the more usual and the more numerous forms of business

corporations. That manufacturing and mercantile corporations profited from the legal security afforded by the contract clause is certain, but they were not, during the nineteenth century, the subject of so many attempts at legislative regulation or control. It was the banks, in the era of state-chartered banks, and later the utilities with which such legislation was usually concerned. And, of course, it was generally corporations of this kind which sought and secured exceptionally favorable franchise rights or immunities. Excepting for the regulations contained in general and special incorporation laws — and with these the contract clause rarely has anything to do, since their effect is ordinarily prospective — the regulatory statutes which mark the decline of *laissez faire* in the nineteenth century dealt very largely with businesses affected with a public interest. And in the constitutional controversies growing out of such statutes, where the issue of federalism was not involved, the contract clause was usually invoked. From the point of view of an Englishman or a Canadian the Court's interpretation of this clause served to give to such corporations a position of extraordinary security against governmental action. But with the general adoption by the states of constitutional and statutory provisions saving the right to alter or amend, coupled with the Court's tendency to interpret public grants strictly, the spokesmen for business interests found the contract clause to be an inadequate source of protection, and continued to press for a broader interpretation of the due process clause. The difference between the point of view of the Court in the railroad rate cases under the contract clause in 1886 and those under the due process clause a few years later is a not inaccurate measure of the increased protection to vested rights which followed the adoption of the substantive conception of due process.

In the Introduction to this study I suggested that not the least interesting aspect of the history of the contract clause is its parallelism with the expansion of political and social democracy. During the first half of the nineteenth century the constitutional

systems of the states became more directly subject to a widening popular will. At the end of the Revolution the property qualification for voting was still almost universal. By the end of Marshall's term as Chief Justice only four states retained such a requirement, and the last of these abandoned it in 1856. During the same period the old colonial property qualification for office holding was given up in all of the states which retained it after the Revolution. Along with these changes came the abandonment of the short for the long ballot. More and more officers of state and local governments were to be elected by vote of the ever-broadening electorate. In short, the political machinery was being placed more directly under the control of the mass of the people. The preponderant control exercised by men of property seemed to be in danger of extinction. But a simple chart of the constitutional and statutory changes of this kind during this period is an inadequate guide to the democracy of the era. The Jacksonian democrats were not Levellers, nor were many of them even sympathetic with the numerous but isolated communist experiments. It may seem paradoxical that, during the period in which the doctrines and practices of political democracy were spreading so rapidly throughout the land, the even more rapid increase in the scope of judicial review should have been tolerated. As the state governments became more responsive to a widening electorate the courts were engaged in extending their supervision over the activities of those governments. For the most part the judicial check took the form of setting aside laws which were seemingly to the interest of the mass of the people and contrary to the interest of the classes which were no longer in control of the political machinery. This is particularly true of the rise of the contract clause.

Perhaps the first step in the explanation of this apparent paradox is that very few realized the future implications of the Marshallian interpretation of the clause. I have pointed out that almost all of the criticisms of his decisions were the product of local prejudices. To be sure, a few of his critics had a fairly clear idea of the effect of his decisions, but these were always in

the minority, and not one of them carried on an extended campaign against this aspect of the Court's work. The major attacks upon the Court and its decisions were in the name of the rights and powers of the states. Books like John Taylor's *Construction Construed, and Constitutions Vindicated* have little or nothing to say of the contract cases. When they do mention them they give little evidence of an understanding of their importance in the development of the doctrines of vested rights. The same is true of all except a very few of the speeches in the state constitutional conventions. These conventions were the ones which were drafting the relatively democratic constitutions. Representatives of the common man were present, but in their many speeches they rarely criticize the tenor of the contract opinions of the Marshall or the Taney Court. It is to be remembered that, although these decisions laid down the principles which were to be so useful to the security of corporate property, they directly affected, in the period before the Civil War, very few persons and very few corporations. For the most part the corporation problem, as later generations were to know it, could not be recognized until there were more corporations to benefit from the generous grants of the era of expansion. During the first half of the century most communities were too much concerned with securing the rapid exploitation of their economic resources to give much thought to the bill to be presented in the future. On no other ground can we explain the astonishingly liberal grants of privileges and immunities then made. Some of those grants were secured by methods which suggest that the interest of the community was not the only consideration involved, but quite enough were made openly and entirely without fraud to justify the generalization.

Yet an explanation which is based largely upon the failure to understand the future significance of a broad interpretation of the contract clause is insufficient. The work of the Marshall and Taney Courts was not the work of a group of conspirators, successful only because few understood and fewer cared about the nature of the conspiracy. It represented the judicial inter-

pretation of principles which were quite as much a part of the political, economic, and legal thought of the age as the movement for responsible governmental machinery or for the many humanitarian reforms which were then adopted. A zeal for extending political power to the propertyless was not an indication of either opposition to or disrespect for the rights of property. The same men who, in the constitutional conventions, advocated a broader suffrage and the abolition of the last remnants of property restrictions upon office holding voted to include in the new constitutions clauses prohibiting the legislatures from passing any law impairing the obligation of contracts. And, as was pointed out in Chapter II, the contract clause was ordinarily included in the bill of rights. It was looked upon as a protection of a fundamental, natural right against the dangers of legislative encroachment. The principle of the omnipotence of legislative bodies over the rights of private persons was as unacceptable to Jefferson and Jackson as it was to John Adams and Hamilton. Distrust of legislatures is manifested even in the state constitutions of the Revolutionary period, and it is increasingly evident in the somewhat more democratic ones of the nineteenth century.

The nineteenth century was a period in which the average American expected to become a man of property. Certainly the economic attitudes of the leading advocates of political democracy differ surprisingly little from those of the Federalists or Whigs, except when an issue involving sectional favoritism is present. Protective tariffs and central banks were one thing; the sanctity of private property was quite another. It was just as undebatable a postulate to the leaders of the Jacksonian democracy as it had been to Samuel Adams in 1768 when he wrote in the Massachusetts Circular Letter that "it is an essential, unalterable right in nature . . . that what a man has honestly acquired is absolutely his own, which he may freely give, but cannot be taken from him without his consent." This point of view is the basic reason why the broad interpretation of the contract clause which was written into the law of the land by Marshall was accepted. The general principle of extending pro-

tection to all manner of contracts, even grants of tax exemption and corporate charters, did to a remarkable extent fit in with the ambitions as well as the apprehensions of the growing democracy, even though it is probable that a Chief Justice appointed by Jefferson would not have placed so broad an interpretation upon the clause. In the doctrines of the Jeffersonian and Jacksonian democrats there is a strong strain of economic conservatism.

True, the story is not complete when this is said. The acceptance of the Marshallian interpretation was tempered by the adoption of clauses reserving to the states the power to alter or amend charters, and, in some states, by prohibitions upon the grant of tax exemptions. These were, I think, not the product of a reaction against the Court's doctrines so much as they were attempts to restrain those doctrines within desirable limits. It is to be remembered, first, that the earliest of the reservation clauses preceded the enunciation by the Court of its interpretation of the contract clause, and, second, that such clauses were being adopted at the same time, frequently in the same constitutions, as the prohibitions against the impairment of the obligation of contract. Even before Marshall ruled that a charter was a contract a number of states had seen fit to reserve the right to alter or repeal. And if these reservation clauses reflect an uncompromising opposition to the judicial view of the contract clause, it is strange indeed that virtually all of the states saw fit to include a clause of the kind in their constitutions. The wording of these clauses followed that of the national constitution, not that of the Northwest Ordinance which permitted the legislatures to pass no law "that shall . . . interfere with or affect private contracts, or engagements, *bona fide*, and without fraud previously formed." With this original model before them, and it could have been no secret from the men who lived in the states formed out of the Territory to which it applied, it is only reasonable to believe that they would have copied it had they been altogether opposed to the attitude of the Court. Evidently they believed that by the adoption of reservation clauses they could secure both the desired protection to legitimate prop-

erty rights, corporate as well as personal, and a sufficient degree of protection against grants corruptly procured or against those which might later prove to be contrary to the public interest.

At first there were few men who seem to have thought of the possibility that there could be any conflict between property honestly acquired and the well-being of society. If this was not an age of complete *laissez faire*, it was an age which valued the principles of individualism. The interest of the whole would be best served if government protected the estates, as well as the lives and liberties, of the citizens. Later in the century doubts concerning the adequacy of this principle developed. Partly because of the spread of those doubts, and partly because of the rapid growth in the number and power of corporations, the limitations upon the early contract doctrines, limitations which were themselves first expounded by the Marshall and Taney Courts, were more frequently applied. And it was in this period that the principle of the inalienable police power was devised. The principle was not applied in a great number of cases because the general adoption of reservation clauses made it less necessary, and because very shortly after its discovery the battlefield on which it was a useful weapon shifted from contract to due process. Nevertheless its development is indicative of the later rather than the earlier attitude toward the interpretation of the contract clause.

In an era of thriving and self-confident individualism the view that all legal ties must arise from consent, and that no subsequent act could impair them, was entirely acceptable. Government itself was still generally believed to be the fruit of contract. It has been the fashion for over a generation to look upon the contract theory of the origin of political society as the product of an age ignorant of history and steeped in a childish psychology. But to the men who had taken part in framing the state constitutions of the Revolutionary period, and to those who helped to frame or to adopt constitutions for the new states of the West, the social contract theory was only a philosophical way of stating what had taken and was taking place throughout

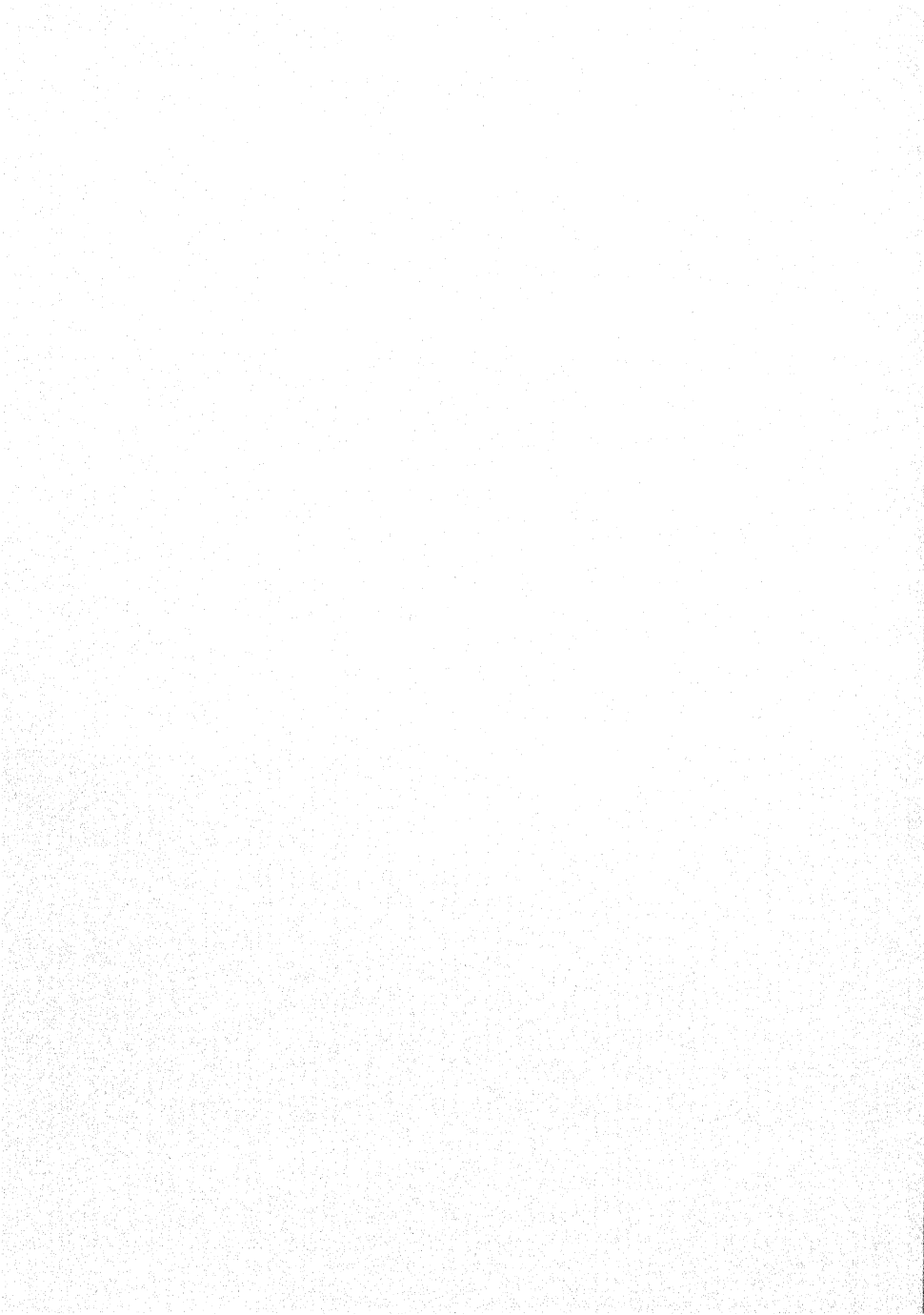
the land. To them it mattered not whether the members to the compact were in a state of nature before the compact was made. The essential characteristic of the compact was agreement of each with all to live together in a civil body politic. They placed great emphasis upon the element of individual responsibility. A free man should weigh carefully his decisions, should enter into contracts only after weighing the elements of advantage and disadvantage involved. After he has made his decision and has made an agreement he should be held to the terms of that agreement. The same conception of the necessity for both foresight and responsibility was transferred to the domain of state action. Even as an individual should be held to the terms of his contracts, so should a state be required to abide by its contracts made. Though the Americans of this generation would have agreed with few of the conclusions of the *Leviathan*, Hobbes' third law of nature would have been accepted without question.

And until the latter part of the nineteenth century few Americans would have questioned Sir Henry Maine's dictum that law progresses from status to contract. The conception of a legal system in which obligations flow from individual engagements was agreeable to the individualistic philosophy which they had inherited from their forebears and which, with some modifications, they found suitable to their needs. Contract tended to become the foundation of a large part of the law, although in the preceding century, especially in the decades preceding the Revolution, it had been of finite scope. This attitude toward contract helps to explain why the originally innocuous obligation of contracts clause was transformed by the courts into a clause applying to a wide field of legislation. The connection between the natural rights ideas of the eighteenth century and the contract clause doctrines of the nineteenth is made apparent in some of the early opinions in which the clause was hesitatingly invoked and its use was buttressed by appeal to the principles of natural justice and free government. Whatever the meaning of contract to the Roman lawyers, or to Blackstone, or to the Convention of 1787, it came to be of remarkably inclusive scope in its constitu-

tional setting. This was the work of the courts, but it was possible for them to give to contract this breadth of meaning because they were thereby but giving expression to principles generally accepted in the political and legal thought of the times.

The displacement of the contract clause by due process of law is but an incident in the continuous development of an idea. The former clause had become too circumscribed by judicially created or permitted limitations, and its place was gradually taken by another clause where the absence of restrictive precedent allowed freer play to judicial discretion. That the concept of contract had been carried over into the newer principles is shown not only by the extremely individualistic trend of many of the due process opinions but more specifically by the "freedom of contract" doctrine which was expressed in some of the most significant decisions involving the due process clause. The problem of the proper limits to the police power of the state developed almost simultaneously in the two instances. Conflicts between the prohibitions of the contract clause and the inalienability of the police power were the first to be considered, but within a few years conflicts between due process and the police power of the states were far more frequently before the Court. And where Chief Justice Marshall was unable to convince the majority of his Court that the right to contract freely was so natural a right of man that not even a previously made law could restrict it, his point of view has become basic in much of the law of due process. Thus the decline of the contract clause after 1890 cannot be taken as an indication that old-style conceptual individualism based upon contract was dead. The battle was to be fought with a newer and a more deadly weapon. The contract clause was to become merely a technical provision to be applied to varying situations in the light of well-established precedents. In terms of specific cases its application did not, on that account, become less important. But it ceased to be the vehicle which conveyed new bodies of ideas into the law of the Constitution. It became a legal provision, and left to its successor the function of serving as the clause under which the courts attempt to recon-

cile the respective spheres of individual and social interests. The transition did not mean that this extremely significant task was being taken out of the scope of the judicial power. In other countries it is a function which is believed to be primarily political in nature, and its performance is usually left to the political departments. In this country, due to the work of Marshall and of the men who accepted his lead, it is achieved very largely under the cloak of legal terminology and through the medium of the judiciary.



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